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HARVARD UNIVERSITY

9

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF THE
STATE OF VERMONT

BY
SENECA HASELTON

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JUDGES
OF THE
SUPREME COURT OF VERMONT
DURING THE TIME OF THESE REPORTS.

HON. RUSSELL S. TAFT, CHIEF JUDGE.

HON. JOHN W. ROWELL.

HON. JAMES M. TYLER.

HON. LOVELAND MUNSON.

HON. HENRY R. START.

HON. LAFORREST H. THOMPSON.

Deceased, June 22, 1900.

HON. JOHN H. WATSON.

HON. WENDELL P. STAFFORD.

Appointed July 2, 1900.

A TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

| | | | |
|---|-----|--|-----|
| Adams, Clt. (State v.) | 253 | Cardiner Bros. (Patton v.)..... | 47 |
| Agostines (Wood v.)..... | 51 | Carpenter (Davis v.) | 259 |
| Alletson v. Powers..... | 417 | Carter v. C. Vt. R. Co..... | 190 |
| Alexander et al. (Court of Insol- vency v.)..... | 15 | Central Vt. Ry. (Rutland-Cana- dian R. v.)..... | 128 |
| Allison et al. (State v.)..... | 222 | Chaffee (Rutland R. Co. v.)..... | 404 |
| Assurance Co. (Clark v.) | 458 | Champlain Mfg. Co. (Daggett v.) | 332 |
| Atkins et al. (Barton Nat'l Bank v.) | 33 | Chase (Ins. Co. v.)..... | 176 |
| Austin (State v.)..... | 46 | Cheshire Beef Co. v. Thrall..... | 9 |
| Bacon v. Hunt & Co..... | 98 | Clark v. Smith & Hays..... | 138 |
| Barber (Fay v.)..... | 55 | Clark v. Assurance Co..... | 458 |
| Barber v. Dummerston..... | 330 | Clark (Howard v.)..... | 429 |
| Barre Water Co. In Re..... | 413 | Clement v. Skinner..... | 159 |
| Barrett v. Fish..... | 18 | Clemmons (Sheldon v.)..... | 185 |
| Barton Bank v. Atkins et al..... | 33 | Cochran (King v.)..... | 107 |
| Beef Co. v. Thrall..... | 9 | Cong. Society v. Flagg..... | 248 |
| Blair, Assignee, v. Ritchie & War- den..... | 311 | Conn. L. Ins. Co. v. Chase..... | 176 |
| Blaisdell & Barron v. School Dist. | 63 | Court of Insolvency v. Alexander | 15 |
| Blaisdell & Barron v. Davis..... | 295 | Curtis v. Simpson..... | 232 |
| Blanchard et al. (Mitchell v.).... | 85 | Daggett v. Champ. Mfg. Co..... | 332 |
| Boston & Maine R. Co. (Willey v.) | 120 | Davis v. Carpenter | 259 |
| Boyd v. Douglass..... | 449 | Davis (Blaisdell & Barron v.).... | 295 |
| Boyden v. Fitchburg R. Co..... | 89 | Delaney v. Brown & Howes..... | 344 |
| Brick Co. (Rioux v.) | 140 | Delaware & H. C. Co. (Sullivan v.) | 353 |
| Bridge Co. v. Pike..... | 7 | Doherty (State v.)..... | 381 |
| Briggs' Est. (Farr v.)..... | 225 | Dohney (State v.) | 260 |
| Brock (Parkhurst v.)..... | 355 | Douglass (Boyd v.)..... | 449 |
| Brown, Apt. (State v.)..... | 410 | Drenan (Hardwick Bank v.)..... | 438 |
| Brown & Howes (Delaney v.).... | 344 | Dummerston (Barber v.)..... | 330 |
| Button (Wade, Adm'r. v.)..... | 136 | Employers' L. A. Co. (Clark v.) | 458 |
| Bylow v. Union C. & S. Co..... | 325 | Estabrook (Sparks v.)..... | 101 |
| | | Estate of Lewis (Rowell v.)..... | 163 |
| | | Fabor v. Green..... | 117 |

| | | | |
|---|-----|---|-----|
| Fairbanks v. Rockingham & Lane | 419 | Knapp v. Wing | 334 |
| Farr v. Briggs' Est. | 225 | Lambert v. Miss. Pulp. Co. | 278 |
| Farrington v. Rutland R. Co. | 24 | Lamoille Co. Bank v. Hunt | 357 |
| Fay v. Barber | 55 | Lawrence (Palmer v.) | 14 |
| Fidelity & C. Co. (Wertheim v.) | 326 | Leonard (State v.) | 102 |
| Fish (Barrett v.) | 18 | Lewis, Est. of, (Rowell v.) | 163 |
| Fitchburg R. (Boyden v.) | 89 | Littleton Bridge Co. v. Pike | 7 |
| Fitzgerald (State v.) | 142 | Lotti (State v.) | 115 |
| Flagg (Cong. Society v.) | 248 | Lumber Co. v. Shepardson | 188 |
| Fletcher Ex'r. v. Fletcher's Est. | 268 | Mansfield (Hyser v.) | 71 |
| Fuller v. Parmenter | 362 | Martin v. Palmer | 409 |
| Garrow v. Miller | 284 | Massey (State v.) | 210 |
| Gould's Will, In Re | 316 | McCawley (Herrick v.) | 240 |
| Grand Trunk Ry. (Kilpatrick v.) | 263 | McDonald (Putnam v.) | 4 |
| Greene v. McDonald | 258 | McDonald (Greene v.) | 258 |
| Green (Fabor v.) | 117 | McIntyre & Wardwell v. William- | |
| Griffiths v. N. E. Tel. & Tel. Co. | 441 | son | 183 |
| Hardwick Bank v. Drenan | 438 | Mead v. Moretown | 323 |
| Hawley v. Hurd | 122 | Miller's Est. (Hurlburt v.) | 110 |
| Hays, Smith & (Clark v.) | 138 | Miller, Pitkin & (Yatter v.) | 255 |
| Herrick v. McCawley | 240 | Miller (Garrow v.) | 284 |
| Hoadley v. Inter. Paper Co. | 79 | Missisquoi Pulp Co. (Lambert | |
| Holden v. Rutland R. Co. | 156 | v.) | 278 |
| Holly, Mt., v. Peru | 68 | Mitchell v. Blanchard | 85 |
| Howard v. Clark | 429 | Montpelier v. Senter | 112 |
| Hunt & Co. (Bacon v.) | 98 | Mount Holly v. Peru | 68 |
| Hunt (Lamoille Bank v.) | 357 | New Eng. Talc. Co. (Severance | |
| Hurlburt v. Miller's Est. | 110 | v.) | 181 |
| Hyde Park L. Co. v. Shepardson | 188 | New Eng. Tel. & Tel. Co., (Grif- | |
| Hyde v. Swanton | 242 | fiths v.) | 441 |
| Hyser v. Mansfield | 71 | Palmer v. Lawrence | 14 |
| In Re Barre Water Co. | 413 | Palmer (Martin v.) | 409 |
| In Re Gould's Will | 316 | Paper Co. (Hoadley v.) | 79 |
| In Re Pierpoint's Will | 204 | Parker v. Blanchard | 85 |
| Insolvency, Court of, v. Alexan- | | Parkhurst v. Brock | 355 |
| der | 15 | Parmenter (Fuller v.) | 362 |
| Insurance Co. v. Chase | 176 | Paterson v. Smith | 288 |
| Internat'l Paper Co. (Hoadley | | Patton v. Cardiner Bros | 47 |
| v.) | 79 | Peru (Mount Holly v.) | 68 |
| Intox. Liquor, Adams Clt. | | Pierpoint's Will, In Re | 204 |
| (State v.) | 253 | Pike (Littleton Bridge Co. v.) | 7 |
| Intox. Liquor, Jabbour, Keeper, | | Pitkin & Miller (Yatter v.) | 255 |
| (State v.) | 22 | Poor House Ass'n v. Sheldon | 126 |
| Johnson (State v.) | 118 | Post v. Kenerson | 341 |
| Kenerson (Post v.) | 341 | Powers (State v.) | 168 |
| Kilpatrick v. G. T. Ry. Co. | 263 | Powers (Alletson v.) | 417 |
| King, Receiver, v. Cochran | 107 | Pulp Co. (Lambert v.) | 278 |

CASES REPORTED.

VII

| | | | | |
|-----------------------------------|-----|---|-----------------------------------|-----|
| Putnam v. McDonald..... | 3 | 4 | State v. Austin..... | 46 |
| Re Pierpoint's Will..... | 204 | | State v. Brown..... | 410 |
| Re Gould's Will..... | 316 | | State v. Doherty..... | 381 |
| Re Barre Water Co..... | 413 | | State v. Dohney..... | 260 |
| Richardson v. St. Albans..... | 1 | | State v. Fitzgerald..... | 142 |
| Richardson (State v.)..... | 49 | | State v. Intox. Liq., Adams Clt.. | 253 |
| Rioux v. Brick Co..... | 148 | | State v. Intox. Liq., Jabbour, | |
| Ritchie & Warden (Blair v.)..... | 311 | | Keeper..... | 22 |
| Rockingham (Fairbanks v.)..... | 419 | | State v. Johnson..... | 118 |
| Rouse (Samson v.)..... | 422 | | State v. Leonard..... | 102 |
| Rowell (State v.)..... | 28 | | State v. Lotti..... | 115 |
| Rowell v. Est. of Lewis..... | 163 | | State v. Massey..... | 210 |
| Russell v. Rood..... | 238 | | State v. Powers..... | 168 |
| Rutland R. Co. (Farrington v.).. | 24 | | State v. Richardson..... | 49 |
| Rutland-Canadian R. v. C. V. Ry. | 128 | | State v. Rowell..... | 28 |
| Rutland R. Co. (Holden v.)..... | 156 | | State v. Schoolcraft..... | 223 |
| Rutland R. Co. v. Chaffee..... | 404 | | State v. Smith, R. A..... | 140 |
| Samson v. Rouse..... | 422 | | State v. Smith, Geo..... | 366 |
| Sartwell v. Sowles & Ladd..... | 270 | | State v. Totten..... | 73 |
| Schoolcraft (State v.)..... | 223 | | State v. Waite..... | 108 |
| School District (Blaisdell & Bar- | | | Sullivan v. D. & H. Canal Co.... | 353 |
| ron v.)..... | 63 | | Swanton (Hyde v.)..... | 242 |
| School Dist. No. 2, (Town School | | | Talc Co. (Severance v.)..... | 181 |
| Dist. v.)..... | 451 | | Thrall (Cheshire Beef Co. v.).... | 9 |
| Simpson (Curtis v.)..... | 232 | | Totten (State v.)..... | 73 |
| Senter (Montpelier v.)..... | 112 | | Town School Dist. v. School Dist. | |
| Severance v. N. E. Talc Co..... | 181 | | No. 2..... | 451 |
| Sheldon P. H. Assn. v. Sheldon.. | 126 | | Union C. & S. Co., (Bylow v.)... | 325 |
| Sheldon v. Clemmons..... | 185 | | Wade, Adm'r v. Button..... | 136 |
| Shepardson (Hyde Park L. Co. | | | Waite (State v.)..... | 108 |
| v.)..... | 188 | | Wardwell, McIntyre & v. Wil- | |
| Simpson (Curtis v.)..... | 232 | | liamson..... | 183 |
| Skinner (Clement v.)..... | 159 | | Webster v. Smith..... | 12 |
| Smilie (Yatter v.)..... | 349 | | Wertheim v. F. & C. Co..... | 326 |
| Smith (Webster v.)..... | 12 | | Willey v. B. & M. R. Co..... | 120 |
| Smith & Hays (Clark v.)..... | 138 | | Williamson (McIntyre & Ward- | |
| Smith (Paterson v.)..... | 288 | | well v.)..... | 183 |
| Smith, R. A. (State v.)..... | 140 | | Wing (Knapp v.)..... | 334 |
| Smith, Geo. (State v.)..... | 366 | | Wood v. Agostines..... | 51 |
| Sparks v. Estabrook..... | 101 | | Yatter v. Pitkin & Miller..... | 255 |
| St. Albans (Richardson v.)..... | 1 | | Yatter v. Smilie..... | 349 |
| State v. Allison..... | 222 | | | |

A TABLE

OF THE

CASES REPORTED IN THIS VOLUME ARRANGED BY COUNTIES.

| | | | |
|-----------------------------------|-----|-----------------------------------|-----|
| ADDISON. | | | |
| Barrett v. Fish..... | 18 | Howard v. Clark..... | 429 |
| Garrow v. Miller..... | 284 | Russell v. Rood | 238 |
| BENNINGTON. | | Rutland-Canadian R. Co. v. C. | |
| Clark, Adm'r. v. Smith & Hays.. | 138 | Vt. Ry. Co. | 128 |
| Curtis v. Simpson..... | 232 | State v. Totten..... | 73 |
| Davis, Adm'r. v. Carpenter..... | 259 | Wertheim, Adm'r. v. Fidelity & | |
| Hawley v. Hurd et al..... | 122 | C. Co..... | 326 |
| Sheldon, Assignee, v. Clemmons.. | 185 | FRANKLIN. | |
| State v. Fitzgerald..... | 142 | Greene v. McDonald..... | 258 |
| State v. Leonard, Apt..... | 102 | Hurlburt v. Miller's Est..... | 110 |
| CALEDONIA. | | Hyde v. Swanton | 242 |
| Blair, Assignee, v. Ritchie & | | Lambert v. Miss. Pulp Co..... | 278 |
| Warden | 311 | Post, Adm'r. v. Kenerson..... | 341 |
| Carter v. Central Vt. R. Co..... | 190 | Richardson v. St. Albans..... | 1 |
| Hardwick Sgs. Bank v. Drenan.. | 438 | Samson v. Rouse..... | 422 |
| Holden v. Rutland R. Co..... | 156 | Sartwell v. Sowles & Ladd..... | 270 |
| King, Receiver, v. Cochran..... | 107 | Sheldon Poor House Ass'n. v. | |
| Littleton Bridge Co. v. Pike..... | 7 | Sheldon | 126 |
| Palmer v. Lawrence et al..... | 14 | State v. Powers | 168 |
| Rioux v. Brick Co..... | 148 | State v. Smith, R. A..... | 140 |
| Sparks, Receiver, v. Estabrook... | 101 | Wade, Adm'r. v. Button et al..... | 136 |
| State v. Allison et al..... | 222 | LAMOILLE. | |
| State v. Massey et al..... | 210 | Hyde Park Lumber Co. v. Shep- | |
| CHITTENDEN. | | ardson..... | 188 |
| Bacon v. Hunt & Co..... | 98 | Lamoille Co. Bank v. Hunt..... | 357 |
| Court of Insolvency v. Alexan- | | State v. Brown..... | 410 |
| der et al..... | 15 | ORANGE. | |
| Delaney v. Brown & Howes..... | 344 | Hyser v. Mansfield..... | 71 |
| Farr v. Briggs' Est..... | 225 | Martin et al. v. Palmer..... | 409 |
| Herrick v. McCawley..... | 240 | | |

CASES REPORTED ARRANGED BY COUNTIES.

IX

ORLEANS.

| | |
|---|-----|
| Barton Nat. Bank v. Atkins et al. | 33 |
| Blaisdell & Barron, Adm'rs. v. School Dist. | 63 |
| Blaisdell & Barron, Adm'rs. v. Davis | 295 |
| Clement v. Skinner | 159 |
| Kilpatrick v. G. T. Ry. Co. | 263 |
| Parkhurst v. Brock | 355 |
| Paterson v. Smith et al. | 288 |
| Willey v. B. & M. R. Co. | 120 |

RUTLAND.

| | |
|--|-----|
| Cheshire Beef Co. v. Thrall | 9 |
| Cong. Society v. Flagg | 248 |
| Daggett v. Champ. Mfg. Co. | 332 |
| Farrington v. Rutland R. Co. | 24 |
| Griffiths, Adm'r. v. N. E. Tel. & Tel. Co. | 441 |
| Hoadley, Adm'r. v. Internat. Paper Co. | 79 |
| In Re Pierpoint's Will | 204 |
| Knapp v. Wing | 334 |
| Mount Holly v. Peru | 68 |
| Rutland R. Co. v. Chaffee | 404 |
| Severance v. N. Eng. Talc. Co. | 181 |
| Sullivan v. D. & H. C. Co. | 353 |

WASHINGTON.

| | |
|------------------------------|-----|
| Bylow v. Casualty Co. | 325 |
| Conn. Gen. Ins. Co. v. Chase | 176 |
| Fabor v. Green | 117 |
| Fay v. Barber | 55 |
| Fuller v. Parmenter | 362 |
| In L. Barre Water Co. | 413 |
| Mead v. Moretown | 323 |
| Montpelier v. Senter | 112 |
| Patton v. Cardiner Bros. | 47 |

| | |
|--------------------------------------|-----|
| Rowell v. Est. of Lewis | 163 |
| State v. Doherty | 381 |
| State v. Dohney | 240 |
| State v. Intox. Liq., Jabbour Keeper | 22 |
| State v. Johnson | 118 |
| State v. Lotti | 115 |
| State v. Rowell | 28 |
| State v. Schoolcraft | 223 |
| State v. Smith, Geo. | 366 |
| Webster v. Smith | 12 |
| Wood v. Agostines | 51 |
| Yatter v. Pitkin & Miller | 255 |
| Yatter v. Smilie | 349 |

WINDHAM.

| | |
|---|-----|
| Alletson v. Powers | 417 |
| Barber v. Dummerston | 330 |
| Boyd v. Douglass | 449 |
| Boyden, Adm'r. v. Fitchburg R. Co. | 89 |
| Clark v. Assurance Co. | 458 |
| Fairbanks et al. v. Rockingham | 419 |
| In Re Gould's Will | 316 |
| McIntyre & Wardwell v. Williamson | 183 |
| Town School Dist. v. School Dist. No. 2 | 451 |

WINDSOR.

| | |
|---------------------------------------|-----|
| Fletcher v. Fletcher's Est. | 268 |
| Mitchell & Parker v. Blanchard et al. | 85 |
| Putnam v. McDonald | 4 |
| State v. Austin | 46 |
| State v. Intox. Liq. Adams, Clt. | 253 |
| State v. Richardson | 49 |
| State v. Waite | 108 |

A TABLE

OF THE

CASES CITED IN THE OPINIONS OF THE COURT.

| | | | |
|--|-----|---|-----|
| Ackerson v. Lodi Branch R. Co., 31 N. J. Eq. 42..... | 435 | Blackburn v. So. Pac. R. Co., 12 Am. Eng. R. Cas. 461..... | 202 |
| Adams v. Bliss, 16 Vt. 42..... | 362 | Blaine v. Curtis, 59 Vt. 120...227, | 231 |
| Adams v. Gay, 19 Vt. 358..... | 290 | Blaisdell v. Stevens, 16 Vt. 179... | 184 |
| Adams v. R. R. Co., 67 Vt. 76..... | 227 | Blake v. McClung, 172 U. S. 239. | 125 |
| Allen v. R.R.Co., 82 Me. 111. 196, | 203 | Blake's Exrs. v. R. R. Co., 30 N. J. Eq. 240..... | 195 |
| Allsop v. Day, 7 H. & N. 457..... | 6 | Blake v. Tucker, 12 Vt. 39..... | 290 |
| Amsden v. Atwood, 69 Vt. 527... | 277 | Blanchard v. Sheldon, 43 Vt. 511 | 137 |
| Appeal of Sharon R. R., 9 Am. St. Rep. 142..... | 133 | Bohanon v. Walcot, 1 How. (Miss.) 336 | 318 |
| Arbuckle v. Templeton, 65 Vt. 205 | 54 | Boies v. Booth, 2 W. Bl. | 231 |
| Aspinwall v. Tousey, 2 Tyler, 328 | 277 | Borley v. McDonald, 69 Vt. 309.. | 357 |
| Atkins v. Atkins, 70 Vt. 567 | 137 | Bovee v. Danville, 53 Vt. 183..92, | 147 |
| | | Boyden v. Fitchburg R. Co., 70 Vt. 125 | 81 |
| | | Boynton v. Hubbard, 7 Mass. 112 | 365 |
| Bailey v. Woburn, 126 Mass. 416 | 416 | Bradley v. Bishop, 7 Wend. 353.. | 258 |
| Baker v. Portland, 58 Me. 199..... | 81 | Bradley v. Phillips, 52 Vt. 517... | 327 |
| Baldwin v. Barney, 12 R. I. 392.. | 81 | Bradley v. Rice, 13 Me. 198..... | 8 |
| Baltimore etc. R. Co. v. Griffith, 159 U. S. 603..... | 94 | Briggs v. Hubbard, 19 Vt. 86 | 331 |
| Bank v. Downer, 29 Vt. 332 | 258 | Brooks v. Thatcher, 49 Vt. 492... | 147 |
| Bank v. Onion, 16 Vt. 470 | 291 | Brown v. Edson Elec. Co., 46 L. R. A. 745 | 444 |
| Bank v. Price, 33 Md. 488..... | 227 | Bryant v. C. Vt. R. Co., 56 Vt. 710 | 26 |
| Barber v. Bennett, 58 Vt. 476..... | 343 | Burgess v. Nash, 66 Vt. 44..... | 240 |
| Barber v. Bennett, 62 Vt. 50..... | 343 | Burnett v. Lynch, 5 Barn. & C., 609 | 158 |
| Bardwell v. Perry, 19 Vt. 292..... | 45 | Burnett v. R. R. Co., (N. J. L.) 38 Atl. 663..... | 195 |
| Barnett v. Ray, 33 Vt. 205 | 127 | Burnham v. Courser, 69 Vt. 183.. | 351 |
| Barre R. Co. v. R. R. Co., 61 Vt. 1 | 133 | Butterfield v. R. R. Co., 10 Allen 532 | 199 |
| Barron v. Barron, 24 Vt. 375..... | 236 | Byerley v. Prevost, L. R., 6 C. P. 144 | 6 |
| Barry v. Harris, 49 Vt. 393..... | 357 | | |
| Barry v. Wixon, 46 Atl. 42..... | 418 | | |
| Bartlett v. Boyd, 34 Vt. 256..... | 312 | | |
| Bartlett v. Walker, 65 Vt. 594..... | 44 | | |
| Bartoli v. Smith, 69 Vt. 427..... | 248 | | |
| Battell v. Matot, 58 Vt. 271..... | 277 | | |
| Baxter v. R. R. Co., 41 N. Y. 502 | 199 | | |
| Beach v. Dorwin, 12 Vt. 139 | 328 | | |
| Bell v. Mayor of N. Y., 10 Paige 49 | 437 | | |
| Bemis v. Morrill, 38 Vt. 153..... | 48 | | |
| Benedict v. Gilman, 4 Paige 58... | 437 | | |
| Berry v. Griffin, 10 Md. 27 | 96 | | |
| Derwick Brewing Co. v. Oliver, 69 Vt. 323 | 101 | | |
| | | Cady v. Sanford, 53 Vt. 632..... | 230 |
| | | Caldwell v. Renfrew, 33 Vt. 213.. | 237 |
| | | Carlisle v. Sheldon, 38 Vt. 440.... | 92 |
| | | Carlton v. Rugg, 149 Mass. 550... | 221 |
| | | Carlton v. Taylor, 50 Vt. 220..... | 276 |
| | | Carr v. Rischer, 119 N. Y. 117..... | 228 |
| | | Carson v. R. R. Co., 147 Pa. 219. | 203 |

| | | | |
|---|-----|--|-----|
| Casey v. Cavaroc, 96 U. S. 467 | | Dana & Henry v. Hancock, 30 | |
| 426, 428 | | Vt. 616 | 161 |
| Catlin v. Merchants Bank, 36 | | Dana v. Sessions, 63 Vt. 405..... | 275 |
| Vt. 572 | 351 | Dauchy v. Brown, 24 Vt. 197..... | 39 |
| Central Vt. R. R. v. Woodstock | | Davenport v. Johnson, 49 Vt. | |
| R. R. 50 Vt. 452..... | 135 | 403 | 65 |
| Chamberlin v. Godfrey, 34 Vt. | | Davenport v. Life Ass'n, 47 Vt. | |
| 383 | 258 | 528 | 465 |
| Chamberlin v. People, 23 N. Y. | | Davis v. Bradley, 24 Vt. 55 | 6 |
| 85 | 31 | Davis v. C. V. R. Co., 66 Vt. 290 | 266 |
| Chamberlin v. Scott, 33 Vt. 80 ... | 155 | Davis v. Hulett, 58 Vt. 90 | 252 |
| Chapman v. Smith, 9 Vt. 153 | 434 | Davis v. Ney, 125 Mass. 590..... | 137 |
| Chase v. Curtis, 113 U. S. 452..... | 228 | Day v. Essex Co. Bank, 13 Vt. | |
| Chase v. R. R. Co., 78 Me. 346... 196 | | 97 | 277 |
| Chase v. R. R. Co., 167 Mass. | | Dean v. Hutchinson, 40 N. J. Eq. | |
| 383 | 201 | 83..... | 451 |
| Cheever v. North, 116 Mich. 390 | 319 | Deans v. W. & W. R. R., 107 N. | |
| Chicago etc. R. R. v. Hedges, | | C. 686 | 120 |
| (Ind.) 3 West. Rep. 892 | 94 | Deragon v. Rutland, 58 Vt. 128.. | 466 |
| Chicago v. Tilley, 103 U. S. 146.. | 155 | Derrickson v. Smith, 27 N. J. L. | |
| City of Pekin v. Reynolds, 31 | | 166 | 228 |
| Ill. 529..... | 67 | Dewey v. Brownell, 54 Vt. 441... 434 | |
| Clark v. Pendleton, 20 Conn. 505 | 161 | Diversey v. Smith, 103 Ill. 375... 228 | |
| Clark v. Rowling, 3 Comst. 216... 294 | | Doe v. Roe, 88 Me. 503 | 337 |
| Clark v. Crosby, 37 Vt. 188 | 357 | Donald v. Suckling, 21 Eng. Rul. | |
| Clark v. Iselin, 88 U. S. 360..... 427 | | Cas. 328..... | 428 |
| Clevelands v. G. T. Ry Co., 42 Vt. | | Donnelly v. Brooklyn City R. | |
| 449 | 25 | Co., 109 N. Y. 16..... | 92 |
| Cleveland, etc. R. R. v. Crawford, | | Douglass County v. Timme, 32 | |
| 24 O. St. 631 | 94 | Neb. 272..... | 114 |
| Clow v. Chapman, 125 Mo. 101 | 338 | Dover v. Winchester, 70 Vt. 418 | 390 |
| Coffey v. U. S., 116 U. S. 436..... 255 | | Dowe v. Morris, 149 Mass. 188 ... 418 | |
| Colvin v. Warford, 20 Md. 391... 318 | | Driggs v. Burton, 44 Vt. 124 | 27 |
| Commonwealth v. Buzzell, 16 | | Driscoll v. Place, 44 Vt. 252 | 276 |
| Pick. 154 | 375 | Dumas v. Stone, 65 Vt. 442 | 182 |
| Commonwealth v. Holmes, 17 | | Duran v. Ins. Co., 63 Vt. 440..... 81 | |
| Mass. 335..... | 380 | Durbin v. R. R. Co., 17 Ore. 5... 200 | |
| Commonwealth v. McGarty, 114 | | | |
| Mass. 299..... | 147 | Eames v. Brattleboro, 54 Vt. 471 | 84 |
| Commonwealth v. White, 8 Pick. | | Eastman v. Curtis, 4 Vt. 616 | 258 |
| 452.. | 29 | Edwards v. Golding, 20 Vt. 30... 6 | |
| Connecticut R. Sgs. Bank v. Al- | | Fairbanks, Brown & Co. v. Davis, | |
| bee, 64 Vt. 571..... | 137 | 50 Vt. 251 | 314 |
| Congdon v. Howe Scale Co., 63 | | Farmers' L. & T. Co., v. Funk. | |
| Vt. 255 | 440 | (Neb.) 68 N. W. 520..... | 42 |
| Continental Improv. Co., v. Stead. | | Farmers' etc. Bank v. Dearing, | |
| 95 U. S. 161..... | 200 | 91 U. S. 29..... | 125 |
| Corliss & Way v. Grow, 58 Vt. | | Farr v. Brackett, 30 Vt. 344..... 37 | |
| 703 | 167 | Farrington v. Jennison, 67 Vt. | |
| Cozine v. Walter, 55 N. Y. 304... 258 | | 569 | 166 |
| Craig v. Gunn, 67 Vt. 92..... | 123 | Field v. Haynes, 28 Fed. Rep. | |
| Crown v. Brainard, 57 Vt. 625.... 41 | | 919 | 230 |
| Currier v. Esty, 110 Mass. 536.... 348 | | First N. B., Louisville v. Ken- | |
| Curtis v. Curtis, 40 Me. 24 | 365 | tucky, 76 U. S. 353 | 125 |
| shing v. Perot, 176 Pa. 66 | 42 | Fisk v. Hartford, 69 Conn. 375... 416 | |
| Daley v. Gates, 65 Vt. 591..... 337 | | Fleming v. R. R. Co., 49 Cal. 253 | 196 |
| Dalrymple v. Whitingham, 26 | | Fletcher v. Howard, 2 Aik. 115 .. | |
| Vt. 345..... | 65 | 48, 426 | |

| | | | |
|--|----------|--|-----|
| Fletcher v. Fitchburg R. Co., 149 Mass. 127..... | 194, 199 | Grigsby v. Breckenbridge, 2 Bush. 480..... | 21 |
| Flinn v. N. Y. etc. R. Co., 142 N. Y. 11..... | 27 | Grostick v. R. R. Co., 90 Mich. 594 | 200 |
| Flintham v. Bradford, 10 Pa. 82. | 320 | Gunnison v. Bancroft, 11 Vt. 490 | 166 |
| Folsom v. Marsh, 2 Story, 100.... | 21 | Hackett v. Moxley, 68 Vt. 210 ... | 235 |
| Foot v. Card, 58 Conn. 1..... | 338 | Hackman v. Maguire, 20 Mo. App. 286..... | 184 |
| Ford v. Buch, 11 Q. B. 869..... | 153 | Hadley v. Stewart, 65 Wis. 481... | 437 |
| Foster, Hyde & v. Franklin Co., 27 Vt. 185..... | 65 | Hale v. Hallon, 90 Tex. 457..... | 365 |
| Frary v. Booth, 37 Vt. 87..... | 235 | Hale v. Metropolitan etc. Co., 4 Drew 492..... | 6 |
| Fratini v. Caslini, 66 Vt. 273..... | 337 | Hall v. Simpson, 63 Vt. 601..... | 324 |
| Frith v. Cartland, 2 H. & M. 417 | 428 | Halsey v. McLean, 12 Allen 43 .. | 22 |
| Galveston, etc. R. Co. v. Porfert, (Tex.) 37 Am. & Eng. Rul. Cas. 540 .. | 197 | Hamor v. Water Co., 92 Me. 364 | 41 |
| Gardner v. Way, 8 Gray, 189..... | 293 | Harrison v. Wyse, 24 Conn. 1.... | 433 |
| Gee v. Pritchard, 2 Swanston, 419 | 21 | Harwell v. Lively, 30 Ga. 315..... | 318 |
| German N. Bank v. F. & M. Bank, 74 N. W. 1086..... | 41 | Harwood v. Goodright, 1 Cowp. 91 | 318 |
| Gerner v. Gerner, 185 Pa. St. 233 | 338 | Hastings v. Lovering, 2 Pick. 214 | 467 |
| Gett v. McManus, 47 Cal. 56..... | 451 | Hathorn v. Calef, 2 Wall. 10..... | 38 |
| Giberson v. R. R. Co., (Me.) 36 Atl. 400..... | 196 | Hayes v. Morse, 8 Vt. 316..... | 167 |
| Gifford v. Ford, 5 Vt. 532..... | 426 | Hearn v. R. R. Co., 43 Atl. 59.... | 202 |
| Gilman v. Strafford, 50 Vt. 723.. | 392 | Herrick v. Orange Co. Bank, 27 Vt. 584 | 362 |
| Gilson v. Parkhurst, 53 Vt. 384 .. | 258 | Hibbard v. Eastman, 47 N. H. 512 | 348 |
| Gindrat v. People, 138 Ill. 103.... | 20 | Higbee v. Sutton, 14 Vt. 555..... | 324 |
| Gleason & Field v. Kinney's Adm'r. 65 Vt. 560 | 343 | Hine v. Pomeroy, 39 Vt. 211..... | 331 |
| Gleason v. McViker, 7 Cow. 41. | 466 | Hoagland v. Segur, 38 N. J. L. 237 | 356 |
| Gleeson v. Va. etc. R. R., 140 U. S. 435..... | 26 | Hodges v. Phelps, 65 Vt. 303..... | 252 |
| Glenn v. Allison, 58 Md. 527..... | 184 | Hogan v. Smith, 125 N. Y., 774. | 283 |
| Godding, Adm'r v. Orcutt, 44 Vt. 54 | 343 | Holcomb v. Danby, 51 Vt. 435... .. | 81 |
| Goodright v. Glazier, 4 Burr. 2512 | 318 | Holmes v. Clark, 46 Vt. 22..... | 124 |
| Gordon v. Tabor, 5 Vt. 103..... | 97 | Holroyd v. Marshall, 10 H. L. 191 | 364 |
| Gorton v. R. R. Co., 45 N. Y. 660 | 199 | Hopkins v. School Dist. 27 Vt. 281 | 274 |
| Goss v. Cardell, 53 Vt. 447..... | 315 | Hopkinson v. Burghley, L. R. 2 Ch. App. 447..... | 21 |
| Graham v. Pierson, 6 Hill 247.... | 292 | Houghton v. Carpenter, 40 Vt. 588 | 6 |
| Grainger v. The State, 5 Yerg. (Tenn.) 459..... | 396 | Housatonic R. Co. v. Lee & Hudson, R. 118 Mass. 391..... | 133 |
| Granard v. Dunkin, 1 Ball. & B. 207 | 21 | Houston v. Brush, 66 Vt. 331..... | 26 |
| Grand Trunk Ry v. Ives, 144 U. S. 408..... | 97 | Howard v. Clark, 71 Vt. 424..... | 431 |
| Granite Co. v. Mulliken, 66 Vt. 465 | 310 | Howard v. Scott, 50 Vt. 48..... | 241 |
| Gregory v. Tomlinson, 68 Vt. 410 | 304 | Howes v. Nicholas, 72 Tex. 481... .. | 318 |
| Griffon v. United Elec. L. Co., 164 Mass. 492..... | 444 | Howe v. Inhab. of Weymouth, 148 Mass. 605 | 416 |
| | | Hoyt v. McKenzie, 49 Am. Dec. 180 | 21 |
| | | Hoyt v. McNally, 66 Vt. 38 | 240 |
| | | Hubbard v. Bugbee, 58 Vt. 172... .. | 235 |
| | | Hubbell v. Moulson, 53 N. Y. 228 | 432 |

| | | | |
|---|----------|--|---------------|
| Hunt v. Tyler, 2 Aik. 235..... | 433 | Low v. Pettingill, 12 N. H. 337... | 315 |
| Huntington v. Attrill, 146 U. S. 657..... | 228, 294 | Lowrey v. Keyes, 14 Vt. 66 | 331 |
| Hyoe & Foster v. Franklin Co., 27 Vt. 185 | 65 | Lunn v. Thornton, 1 C. B. 386 ... | 364 |
| Hyde v. Jamaica, 27 Vt. 443..... | 92 | Lynde v. Davenport, 57 Vt. 597.. | 111 |
| Illinois Cen. R. Co. v. Nowicki, 148 Ill. 29..... | 192 | Lyndon Mill Co., v. Lyndon Inst., 63 Vt. 581..... | 440 |
| Imloy v. Carpentier, 14 Cal. 173.. | 292 | Lyon v. Witters, 65 Vt. 396 | 166 |
| Inland etc. Co. v. Tolson, 139 U. S. 531 | 121 | Lytton v. Dewey, 54 L. J. Ch. 293 | 21 |
| In Re Comstock, 22 Vt. 642..... | 293 | Magoon v. B. & M. R. R., 67 Vt. 177..... | 121, 203, 267 |
| In Re Diggin's Est., 68 Vt. 198... | 343 | Manley v. D. & H. C. Co., 69 Vt. 101 | 193 |
| In Re Hallett's Est., 13 Ch. D. 719 | 428 | Manufacturers' Ac. Ind. Co. v. Dorgan, 7 C. C. A. 581..... | 463 |
| In Re Horton, 45 L. T. 541. | 357 | Marshall v. Aiken, 25 Vt. 327..... | 362 |
| In Re Welch's Will, 69 Vt. 127... | 111 | Martin v. Blattner, 68 Ia..... | 219 |
| Jackway v. Barrett, 38 Vt. 316.... | 275 | Marvin v. Dennison, 20 Vt. 662... | 275 |
| Jewett v. Winship, 42 Vt. 204..... | 48 | Mason v. Gray, 36 Vt. 308..... | 440 |
| Johnson v. Burden, 40 Vt. 567 ... | 312 | Matter of the City of Buffalo, 68 N. Y. 175..... | 134 |
| Johnson v. Irasburgh, 47 Vt. 32.. | 81 | McArthur v. Pease, 46 Barb. 423. | 258 |
| Johnson v. Kelley, 67 Vt. 386..... | 362 | McCanna v. R. R. Co. (R. I.) 39. Atl. 891..... | 201 |
| Jones v. Ellis, 68 Vt. 544..... | 307 | McClure v. McClure, 86 Tenn. 173 | 318 |
| Jordan v. Lewis, 2 Strange 1122.. | 20 | McClure v. Raben, 133 Ind. 507.. | 365 |
| Kelley v. Kriess, 68 Cal. 210..... | 348 | McCrary v. R. R. Co., 31 Fed. Rep. 531..... | 199 |
| Kendall v. Tracy, 64 Vt. 522..... | 407 | McCulloch v. Maryland, 4 Wheat. 316 | 125 |
| King v. Hamlet, 2 Mylne & Keene 456 | 366 | McKay v. So. Bell Tel. Co., 111 Ala. 337..... | 444 |
| Knight v. Preston, 2 Wils. 332... | 466 | McKusick v. Seymour etc. Co. (Minn.) 50 N. W. 1114..... | 42 |
| Lambert v. Miss. Pulp Co., 72 Vt. 278 | 237 | Meckles v. Dillaye, 17 N. Y. 80... | 437 |
| Latremonille v. Ben. Ry Co., 63 Vt. 336..... | 26, 95 | Melendy v. Spaulding, 54 Vt. 517. | 278 |
| Lau Ow Bew v. U. S., 144 U. S. 47..... | 118 | Michigan State Bank v. Peck. 28 Vt. 200 | 10 |
| Lawrence v. Accident Ins. Co., 72 Q. B. Div. 216..... | 468 | Minneapolis etc. R. R. v. Beckwith, 129 U. S. 26..... | 125 |
| Lawson v. Morrison, 2 Dall. 286. | 320 | Minor v. State, 56 Ga. 630..... | 146 |
| Lazelle v. Newfane, 70 Vt. 440... | 84 | Mitchell v. Hotchkiss, 48 Conn. 9 | 228 |
| Lazelle v. Newfane, 69 Vt. 306.... | 94 | Montgomery v. Chadwick, 7 Ia. 134 | 437 |
| Legett v. Tollervey, 14 East 302.. | 20 | Montgomery v. Edwards, 46 Vt. 151 | 277 |
| Leicester v. Brandon, 65 Vt. 544.. | 127 | Moore v. Cable, 1 John. Ch. 385. | 437 |
| Leonard v. Rutland, 66 Vt. 105... | 416 | Morgan v. Morgan, 92 Me. 190.... | 337 |
| Lewis v. Shattuck, 4 Gray 476..... | 291 | Morgan v. Walbridge & Chase, 56 Vt. 405..... | 437 |
| Limerick Bank v. Adams, 70 Vt. 132 | 304 | Mott v. Hazen, 27 Vt. 213..... | 258 |
| Lincoln v. Johnson, 43 Vt. 74..... | 167 | Mott v. Mott, 5 Vt. 111..... | 362 |
| Linsley v. Loveley, 26 Vt. 123.... | 6 | Mulrein v. Smillie, 25 (N. Y.) App. Div. 135..... | 184 |
| Louisville etc. Ry. Co. v. Buck, 116 Ind. 566 | 81 | Munson v. Rice, 18 Vt. 53..... | 166 |
| Louisville Ry Co. v. Goodykoontz, 12 Am. St. Rep. 375 | 84 | | |

| | | | |
|--|----------|--|----------|
| Murtey, Rec'r v. Allen, 71 Vt. 377..... | 102, 107 | Quinn v. Halbert, 57 Vt. 178..... | 360 |
| Neal v. Moultrie, 12 Ga. 104..... | 229 | R. v. Meek, 9 C. & P..... | 31 |
| Neill v. Keese, 5 Tex. 23..... | 455 | Randall v. Beatty, 31 N. J. Eq. 643..... | 318 |
| New v. Nicoll, 73 N. Y. 127 | 184 | Re Welch's Will, 69 Vt. 127..... | 111 |
| Newman v. Barton, 2 Vern. 205.. | 43 | Reed v. Wood, 9 Vt. 285..... | 5 |
| New York v. Brooklyn F. Ins. Co., 41 Barb. 231..... | 451 | Reese v. Medlock, 27 Tex. 120..... | 315 |
| Nichols v. Hooper, 61 Vt. 295..... | 123 | Rex v. Cohen, 1 Starkie, 416..... | 29 |
| Nixon v. Phelps, 29 Vt. 187..... | 324 | Rice v. Rudd, 57 Vt. 6..... | 72 |
| Noel v. Robinson, 1 Vern. 90..... | 43 | Richardson Admr. v. Cook, 37 Vt. 599..... | 331 |
| Noland v. Whitney, 88 N. Y. 648 | 155 | Richardson v. Morrill's Est., 32 Vt. 27..... | 237 |
| Noyes v. Nichols, 28 Vt. 159..... | 11 | Richmond v. Standclift, 14 Vt. 258..... | 180 |
| Noyes v. Parker, 64 Vt. 384..... | 173 | Rodrian v. R. R. Co., 125 N. Y. 528..... | 199 |
| Noyes Will, The, 61 Vt. 14..... | 321 | R. R. Co. v. Cody, 166 U.S. 606... | 198 |
| Nunez v. Dautel, 19 Wall. 560..... | 154 | R. R. Co. v. Graves, 80 Fed. Rep. 588..... | 230 |
| Ochiltree v. Iowa etc. Co., 21 Wall. 249..... | 38 | R. R. Co. v. Griffith, 159 U. S. 603..... | 198 |
| Oliver v. Pray, 19 Am. Dec. 603.. | 348 | R. R. Co. v. Howard, 124 Ind. 280 | 200 |
| Orient Ins. Co. v. Daggs, 172 U. S. 557..... | 124 | R. R. Co. v. Houston, 95 U. S. 702 | 195 |
| Paris v. Bellow's Est., 52 Vt. 351 | 343 | R. R. Co. v. Lane, 130 Ill. 116..... | 197, 201 |
| Parkhurst v. Sumner, 23 Vt. 541. | 258 | R. R. Co. v. Righter, 42 N. J. L. 180..... | 200 |
| Parks v. Goodwin & Hand, 1 Mich 35..... | 291 | R. R. Co. v. Smalley, (N. J.) 39 Atl. 695..... | 201 |
| Patterson v. Smith, 66 Vt. 633... | 44 | Rudisell v. Rodes, 29 Gratt. 47... | 318 |
| Paul v. Virginia, 8 Wall. 168. | 124 | Russell v. Allerton, 108 N. Y. 288 | 153 |
| Payne's Admr. v. Payne, 29 Vt. 172..... | 275 | Russell v. Fillmore, 15 Vt. 130... | 426 |
| Peabody v. Landon, 61 Vt. 318... | 364 | Russell v. Sloan, 33 Vt. 656..... | 118 |
| Pecham v. Port. Elec. Co. 33 Ore. 451..... | 444 | Russell v. Southard, 12 How. 139 | 432 |
| Peck's Appeal, 50 Conn. 562..... | 320 | Salter v. R. R. Co., 75 N. Y. 273.. | 199 |
| Pembina etc. Co. v. Perm. 125 U. S. 181..... | 124 | Sanborn v. Chittenden, 27 Vt. 171 | 6 |
| People v. Nash, 111 N. Y. 310..... | 277 | Sanborn v. Cole, 63 Vt. 590..... | 167 |
| People v. Healey, 128 Ill. 9..... | 418 | Sanders v. Wilson, 34 Vt. 318..... | 435 |
| Perry v. Morse, 57 Vt. 509..... | 30 | Sandgate v. Rupert, 67 Vt. 258... | 127 |
| Petty v. Hannibal etc. R. Co. (Mo.) 28 Am. & Eng. R. Cas. 618..... | 198 | Sargent v. Baldwin, 60 Vt. 17..... | 137 |
| Philadelphia etc. R. Co. v. Tow-boat Co., 23 How. 209..... | 81 | Sawyer v. Harmon, 136 Mass. 414 | 258 |
| Pickens v. Davis, 134 Mass..... | 321 | Schmidt v. Humphrey, 48 Ia. 652 | 81 |
| Pickering v. Hastings, (Neb.) 76 N. W. 587..... | 42 | Schriber v. R. R. Co. (Minn.) 2 Am. & Eng. R. Cas. N. S. 289 | 192 |
| Pierce v. Cusic, 56 Vt. 418..... | 72 | Scott v. Finck, 45 Mich. 241..... | 318 |
| Pike v. Pike, 69 Vt. 535..... | 277 | Seaver v. Adams, 66 N. H. 142... | 338 |
| Pinney v. Fellows, 15 Vt. 525..... | 235 | Seaver v. Durant, 39 Vt. 103..... | 432 |
| Pitts v. Congdon, 2 N. Y. 352..... | 362 | Sentell v. New Orleans etc. R. R., 166 U. S. 698..... | 141 |
| Platz v. Cohoes, 89 N. Y. 219..... | 81 | Sewall v. Robbins, 139 Mass. 164 | 320 |
| Pollard v. Bailey, 20 Wall. 520... | 41 | Shattuck v. Oakes, 14 Vt. 556..... | 324 |
| Post v. Toledo etc. R. Co. 144 Mass. 341..... | 42 | Sherman v. D. & H. C. Co., 71 Vt. 325..... | 82 |
| Price v. Grise, 92 Va. 783..... | 451 | Shreveport v. Cole, 129 U. S. 36.. | 38 |

| | | | |
|---|--------------------|--|-----|
| Slaughter House Cases, 83 U.S. 36 | 125 | Stone v. Hackett, 12 Gray 227..... | 137 |
| Small v. Haskins, 29 Vt. 187..... | 324 | Story v. Downey, 62 Vt. 243..... | 336 |
| Smith v. Niagara Ins. Co., 60 Vt. 682..... | 144 | Story v. Furman, 25 N. Y. 214... | 39 |
| Smith v. R. R. Co., 87 Me. 339.... | 196 | Stukeley v. Butler, Hob. 175..... | 466 |
| Smyth v. Ames, 169 U. S. 466..... | 41 | Sturgiss v. Hull, 48 Vt. 302..... | 113 |
| Sooy et al. v. New Jersey, 39 N. J. L. 136..... | 180 | Sutton v. Wauwatosa, 29 Wis. 21 | 81 |
| Sowles v. Carr, 69 Vt. 414..... | 278 | Swift v. Cobb, 10 Vt. 282..... | 258 |
| Spalding v. Est. of Warner, 52 Vt. 29..... | 43 | Templeton v. Montpelier, 56 Vt. 328..... | 266 |
| Stackus v. R.R. Co., 79 N.Y. 464. | 197 | Terry v. Little, 11 Otto. 216..... | 41 |
| Starace v. Rossi, 69 Vt. 303..... | 101 | The Noyes Will, 61 Vt. 14..... | 321 |
| State v. Atkinson, 40 S. C. 363.... | 20 | Thomas v. Carter, 63 Vt. 609..... | 44 |
| State v. Bates, 36 Vt. 387..... | 180 | Thompson v. Mawhinney, 17 Ala. 362..... | 77 |
| State v. Bean, 19 Vt. 530..... | 380 | Thornton's Exrs v. Thornton's Heirs, 39 Vt. 122..... | 97 |
| State v. Bugbee, 22 Vt. 32..... | 380 | Thrall v. Horton, 44 Vt. 386..... | 240 |
| State v. Camley, 67 Vt. 323..... | 33 | Tilden v. Crimmins, 60 Vt. 546... | 315 |
| State v. Carr, 58 Vt. 483..... | 396 | Tilley v. Hudson R. R., 29 N. Y. 252..... | 84 |
| State v. Daley, 53 Vt. 442..... | 77 | Tower v. Rutland, 56 Vt. 28..... | 440 |
| State v. Davidson, 12 Vt. 303..... | 380 | Towle v. Wilder, 57 Vt. 622..... | 123 |
| State v. Downer, 8 Vt. 425..... | 380 | Town v. Griffith, 17 N. H. 165... | 315 |
| State v. Fitzgerald, 68 Vt. 125.... | 54 | Town of Barre v. Sch. Dist., 67 Vt. 108..... | 455 |
| State v. Flint, 60 Vt. 314..... | 375 | Townsley v. Barber, 27 Vt. 417... | 184 |
| State v. Fournier, 68 Vt. 270..... | 172, 379 | Trow v. C. V. R. Co., 24 Vt. 487. | 120 |
| State v. Gorham, 67 Vt. 365..... | 77 | Tunbridge v. Norwich, 17 Vt. 493 | 70 |
| State v. Griswold, 67 Conn. 290.. | 20 | Turner v. Evans, 2 El. & Bl. 512. | 356 |
| State v. Hayden, 51 Vt. 296..... | 392 | Tyler v. N. Y. etc. R. R., 137 Mass. 238..... | 94 |
| State v. Hooker, 17 Vt. 669..... | 380 | Union Pac. R. Co. v. Jarvis, 3 C. C. A. 433..... | 182 |
| State v. Kelley, 65 Vt. 531..... | 75 | United States v. Speed, 8 Wall. 84 | 154 |
| State v. Marsh, 70 Vt. 288..... | 76 | United States Tr. Co. v. Stanton, 139 N. Y. 531..... | 184 |
| State v. Mathers, 64 Vt. 101..... | 20 | Varner v. Nobleborough, 2 Green. 121..... | 67 |
| State v. Murphy, 71 Vt. 127..... | 221 | Vaughn v. Congdon, 56 Vt. 111.. | 30 |
| State v. Nooks, 70 Vt. 247..... | 340 | Vinton v. Schwab, 32 Vt. 612.... | 26 |
| State v. Nulty, 57 Vt. 543. | 275 | Wafford v. State, 44 Tex. 439..... | 146 |
| State v. Price, 92 Ia. 87..... | 218 | Wagner v. Shank, 59 Md. 313.... | 348 |
| State v. Reynolds, 47 Vt. 297..... | 110 | Waite v. Dowley, 94 U. S. 527.... | 125 |
| State v. R. R. Co., (Md.) 39 Atl. 610..... | 195 | Walston v. Smith, 70 Vt. 19..... | 184 |
| State v. Shattuck, 69 Vt. 403..... | 50 | Ward & Co. v. Morrison, 25 Vt. 593..... | 365 |
| State v. Slack, 69 Vt. 493..... | 172 | Warner v. Warner's Est., 37 Vt. 356..... | 321 |
| State v. Smith, 63 Vt. 201..... | 37 | Washburn v. Bank of B. Falls, 19 Vt. 278..... | 45 |
| State v. Stoll, 17 Wall. 425..... | 454 | Wasson v. Rowe, 16 Vt. 525..... | 6 |
| State v. Ward, 61 Vt. 153..... | 144, 171, 175, 380 | Waterman v. Buck, 58 Vt. 519... | 241 |
| State v. Welch, 65 Vt. 50..... | 331 | | |
| State v. Wheeler, 35 Vt. 265..... | 380 | | |
| State v. Wheeler, 64 Vt. 569..... | 413 | | |
| State v. Woodbury, 67 Vt. 602... | 392 | | |
| Stevens v. Fisher, 30 Vt. 200..... | 53 | | |
| Stevens v. Hewitt, 30 Vt. 262..... | 53 | | |
| Stevens v. Pillsbury, 57 Vt. 205.. | 359 | | |
| Stewart v. Flint, 57 Vt. 216..... | 215 | | |
| Stewart v. Mulholland, 88 Ky. 38 | 318 | | |
| Stockfleth v. De Tastet, 4 Camp. 10..... | 20 | | |
| Stokes v. Stickney, 96 N. Y. 323.. | 228 | | |

| | | | |
|-------------------------------------|-----|------------------------------------|--------------|
| Way v. Davidson, 12 Gray 465... | 427 | Williams v. Williams, 142 Mass. | |
| Welch's Will, In Re, 69 Vt. 127.. | 111 | 515 | 321 |
| West River Bank v. Gale, 42 Vt. | | Wilson v. Book, 43 Pac. 939..... | 42 |
| 27..... | 72 | Winchel v. Stiles, 15 Mass. 230... | 258 |
| Western C. & M. Co. v. Ingraham, | | Windham Prov. Assn. v. Sprague, | |
| 17 C. C. A. 71..... | 182 | 43 Vt. 502 | 40, 230 |
| Westminster v. Willard, 65 Vt. | | Winspear v. Acc. Ins. Co., 2 Q. | |
| 266 | 214 | B. Div. 42..... | 468 |
| White & Williams v. Platt, 5 | | Wisconsin v. Pelican Ins. Co., | |
| Denio 269..... | 427 | 127 U. S. 265..... | 294 |
| White v. Maynard, 54 Vt. 575..... | 434 | Witters, Rec'r v. Foster, Adm'r, | |
| Whitney v. Richardson, 31 Vt. | | 26 Fed. Rep. 737..... | 229 |
| 300 | 407 | Wood v. Dudley, 8 Vt. 430..... | 426 |
| Willard v. Dow, 54 Vt. 188..... | 237 | Wood v. McCain, 7 Ala. 800..... | 316 |
| Willard v. Pinard, 65 Vt. 160 | 241 | Woodbury v. Warren, 67 Vt. 251 | 73 |
| Williams v. Eggleston, 170 U. S. | | Woolsey v. Judd, 4 Duer 380..... | 21 |
| 304 | 455 | Worcester etc. R. R. v. R. R. | |
| Williams v. Haskin's Est., 66 Vt. | | Com'rs, 118 Mass. 561 | 133 |
| 383 | 137 | Worthington v. C. V. R. Co., 64 | |
| Williams v. School Dist., 33 Vt. | | Vt. 107... .. | 92, 193, 267 |
| 271..... | 455 | Wright v. Parker, 2 Aik. 212..... | 433 |
| Williams v. State, 100 Ga. 511..... | 20 | | |

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF VERMONT.

A. S. RICHARDSON v. CITY OF ST. ALBANS.

January Term, 1899.

Present: TAFT, C. J., ROWELL, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed August 31, 1899.

Taxation—Exemption of capital of corporation exempts shares of stock. If a town votes to exempt the capital of a manufacturing corporation from taxation under the provisions of V. S. 365, the shares of its stockholders are thereby exempted.

Taxation—Shares exempt by municipal vote deducted from offset. Under V. S. 411, providing for the deduction from any offset claimed by a taxpayer of the amount of stock and bonds held by him "exempt from taxation by the laws of this State", shares of stock exempt by virtue of a municipal vote authorized by a law of the State must be deducted.

ASSUMPSIT. Franklin County, September Term, 1898, *Tyler*, J., presiding. Trial by court. Judgment for defendant. Plaintiff excepted.

The case was tried upon the following stipulation: "The only question involved in this case is whether the listers of defendant City were authorized under the law to deduct from debts owing by the plaintiff, shares of par value stock owned by him in the Fletcher Granite Co., a corporation that was exempted from taxation by a vote of the Town and Village of St. Albans,

for a term of years not yet expired, under sec. 365, V.S., which votes of exemption were prior to the organization of the City, and covered all capital of said company, before deducting said debts from personal estate to be listed for taxation. If the listers were not authorized to make such deduction, the plaintiff is entitled to recover \$165.64 and costs. If they were authorized to make such deduction the defendant is entitled to recover its costs."

F. W. McGettrick for the plaintiff.

Wilson & Hall for the defendant.

MUNSON, J. Section 362 of the Vermont Statutes provides that certain property therein specified "shall be exempt from taxation," and the list given includes shares of stock in corporations out of the State and stock in railroad corporations in the State. Section 365 provides that certain manufacturing establishments, and all capital and personal property used in their business, may be exempted from taxation for a term of years "if the town so votes." Section 411 provides that in determining the grand list of a tax-payer the listers shall deduct from any offset claimed by the tax-payer on account of his indebtedness, the aggregate amount of his United States government bonds and other stocks and bonds "exempt from taxation by the laws of this State." The defendant's listers reduced the plaintiff's offset by the amount of his stock in the Fletcher Granite Company, a corporation exempted from taxation by the vote authorized by sec. 365. The plaintiff insists that this reduction of his offset was illegal; claiming in the first place that the vote authorized by sec. 365 does not exempt the stock of a shareholder, and claiming further that if it does, the stock is not exempted "by the laws" of the State within the meaning of sec. 411.

It is said that the capital used in the business of a corporation is not the stock itself, but the avails derived from a sale of it; that when stock is issued it passes from the control of the corporation, and becomes the individual property of the different

stockholders; and that consequently an exemption of the capital of the corporation does not relieve its stockholders from a taxation of their shares. But we think this distinction, however properly it might be taken in disposing of some questions, cannot be maintained in determining this question of exemption. It is clear that an exemption of the working capital of a corporation would not afford the relief intended, if all its stock was taxed to the individual stockholders. The capital of the corporation and the shares of its stockholders are different forms of the same thing. There is no value to the stock independent of the property which it represents. The property of the corporation is the property of the stockholders who compose it, and the shares held by each represent his interest in the corporate assets. It seems clear that for the purposes in hand the capital of the corporation and the shares of the individual members must be treated as identical, and that an exemption of the capital carries with it an exemption of the individual holding. This view is in line with sec. 383, which provides that in assessing stockholders for stock in a manufacturing corporation the amount shall be reduced by the value of the real and personal property taxed to the corporation. The question presented has not before this been brought to decision in this State, but it has been repeatedly held in other jurisdictions that when the charter of a corporation exempts it from taxation, the shares held by its stockholders are also exempt. Cooley on Taxation, 168.

But the plaintiff claims further that if the vote authorized by sec. 365 was effective to exempt his stock from taxation, it was not exempted from taxation by the laws of the State within the meaning of that term as used in sec. 411. It is said that there is a plain distinction between property exempt from taxation by the laws of the State, and property exempted from taxation by a municipal vote authorized by the law of the State; and that certain classes of stock having been directly exempted by sec. 362, the language of sec. 411 must be held to refer to that stock. It is certain that exempted property may be separated

into two classes by the distinction suggested, but we think it is apparent that the Legislature used the term in question in a sense inclusive of both. The provision was designed to preclude the benefit of offset to the extent of a benefit derived from non-taxation. No reason occurs to us for supposing that the Legislature intended to distinguish between the two methods of exemption. For the purposes of the enactment it was immaterial whether the exemption was effected by its direct vote or by the vote of some body to which it had delegated its authority. The phrase in question might well be used as covering both; for the exemption, by whichever method conferred, is by virtue of the law of the State.

Judgment affirmed.

EUGENE PUTNAM v. T. F. McDONALD.

October Term, 1898.

Present : ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed August 31, 1899.

Bill of sale—Receipted statement of account. A dated instrument the substance of which was, "E. P. Putnam to T. F. McDonald, Dr. one bicycle, \$47.50. Paid, T. F. McDonald", is not a bill of sale, but a receipted statement of account.

Oral evidence admissible—Such being the character of the instrument oral evidence was admissible to show a warranty.

CASE FOR FALSE WARRANTY in the sale of a bicycle. Plea, general issue. Windsor County, May Term, 1898, *Ross*, C. J. presiding. Trial by jury. Verdict directed for the defendant. Judgment on verdict. Plaintiff excepted.

The plaintiff purchased of the defendant a bicycle and took from him at the time of the sale the following written instrument:

“Terms Cash. Ludlow, Vt., July 27, 1896.
Mr. E. P. Putnam
To T. F. McDonald, Dr.
Dealer in
Hardware, plumbing, iron, steel, cordage, cutlery, glass, wooden-
ware, paints, oils, doors, sash and blinds.
1 Bicycle \$47.50
Paid, July 27, 1896.
T. F. McDONALD.

The plaintiff offered oral evidence of a warranty by the defendant at the time of the sale, which was excluded.

Gilbert A. Davis and *Edward R. Buck* for the plaintiff.

W. W. Stickney and *J. G. Sargent* for the defendant.

MUNSON J. It has been repeatedly declared by this court that the rule which prohibits the introduction of parol evidence to vary a written contract is applicable to bills of sale in the usual form, and in the first case where the rule was thus applied it was held to exclude proof that the property sold was warranted. *Reed v. Wood*, 9 Vt. 285. But it is clear that if the writing lacks the requisites of a bill of sale, and amounts only to a receipt, the rule is not applicable, and the warranty may be shown. Rob. Dig. 302, sec. 449; 4 A. & E. Ency. Law, 2nd Ed. 569. So the question for consideration is whether the writing taken by the plaintiff is to be regarded as a bill of sale.

A bill of sale is a writing evidencing the transfer of personal property from one person to another. The nature of the writing would seem to require that it contain some statement of the fact of transfer. We think it will be found that all the informal writings treated by our court as bills of sale referred to the property as having been “bought.” *Reed v. Wood*, 9 Vt. 285;

Wason v. Rowe, 16 Vt. 525 ; *Edwards v. Golding*, 20 Vt. 30; *Davis v. Bradley*, 24 Vt. 55 ; *Linsley v. Lovely*, 26 Vt. 123 ; *Sanborn v. Chittenden*, 27 Vt. 171. It was said in *Houghton v. Carpenter*, 40 Vt. 588, that a bill of sale must contain the substantial elements of a contract; and one of the defects pointed out in the writing then under consideration was that it did not contain any words importing a transfer of title. Under the English statute requiring the registration of bills of sale, it is held that a receipt for the purchase money of goods sold, not amounting on the face of it to a grant or transfer, is not a bill of sale within the requirement. 3 Add. on Con. Morg. Ed. sec. 1061 ; citing *Hale v. Metropolitan etc. Co.* 4 Drew 492 ; *Allsop v. Day*, 7 H. & N. 457 ; *Byerley v. Prevost*, L. R. 6 C. P. 144.

We think the omission of the usual reference to the property as "bought of" the creditor distinguishes the writing in question from those considered in our cases above cited, and precludes its classification as a bill of sale. It does not purport to be a transfer of property, but a charge for property transferred. Such a charge always implies that there has been a transfer, but some statement of the fact of transfer is required to constitute a bill of sale. This writing contains no more than is essential to a good receipt. It may properly be designated as a receipted statement of account. It is such a writing as would be produced by copying, with the required designation of the creditor, an entry from a merchant's daybook, and affixing a receipt on payment. A writing of this character does not undertake to state the contract, and affords no basis for the presumption that it contains the whole contract. We think that in classifying as bills of sale writings framed by inserting items of account under the heading of goods "bought", our court has gone far enough. We do not find it necessary to enter upon a consideration of the cases in which parol evidence was received in connection with bills of that form.

Judgment reversed and cause remanded.

LITTLETON BRIDGE CO. v. DANIEL & ROBERT PIKE.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON and WATSON, JJ.

Opinion filed August 31, 1899.

Appeal from appraisal of land damages. An appeal lies to the County Court from the appraisal of land damages by commissioners appointed under No. 265, Acts of 1896, incorporating the Littleton Bridge Company.

Definition—"To" as a word of inclusion—"To" is a word of exclusion unless it appears by necessary implication to have been used otherwise; but in the reference to V. S. 3815 "to" 3821 made in the above act the necessary implication is that it was used as a word of inclusion.

Exceptions do not lie—Under the construction necessary to be put upon the act of incorporation in connection with V. S. 3821 which is referred to therein as a governing section, exceptions to the Supreme Court do not lie from the decision of the County Court upon the report of commissioners appointed under said act.

APPEAL BY LAND OWNERS from the decision of commissioners appointed on the petition of the Littleton Bridge Company under the provisions of No. 265, Acts of 1896, incorporating the petitioner. Caledonia County, December Term, 1898, *Start, J.* presiding. Judgment on the report of commissioners, appointed by the County Court, in favor of the petitionees for eighty-five dollars, with costs to the petitioner. Petitionees excepted.

In the Supreme Court the petitioner filed a motion to dismiss on the ground of want of jurisdiction on the part of the County Court and of the Supreme Court.

Bates, May and Simonds for the petitioner.

Geo. F. Morris for the petitionees.

MUNSON, J. This is an appeal by land-owners from the decision of commissioners appointed on the petition of the Littleton Bridge Company, under the provisions of No. 265, Acts of 1896. The petitioner moves to dismiss the appeal, on the ground that the County Court had no jurisdiction.

The act above named provides that two Judges of the Supreme Court, on being applied to by the corporation, shall appoint commissioners to determine the damages sustained by the owners of the land taken, and further provides as follows: "The proceedings thereafter shall be the same as those provided for in sections 3815 to 3821 of the Vermont Statutes, and said sections shall govern all proceedings had by said commissioners and corporation and by the court and all concerned, to the final determination of the matter."

The only provision for an appeal contained in these sections of the Vermont Statutes is in section 3821, and the petitioner contends that that section is excluded by the language above quoted. "To" is a word of exclusion, unless it appears by necessary implication to have been used in a different sense. *Bradley v. Rice*, 13 Me. 198: 29 Am. Dec. 501. In this instance it is clear that the Legislature considered that sec. 3821 was included; for the act provides that in all subsequent proceedings "the court" shall be governed by the sections referred to, and there could be no subsequent proceedings before any court unless sec. 3821 was included.

But it is said that if sec. 3821 is included, this court can have no cognizance of the case, because of the provision of that section that the decision of the County Court shall be final upon the report of the commissioners. On the other hand, the petitioners refer to V. S. 1625, which provides that questions of law determined by a County Court upon the trial of any special, summary or sessions proceedings may pass to the Supreme Court for final decision. The provision afterwards embodied in sec. 3821 was the earlier enactment and the petitioners assume that it was repealed by the comprehensive language of the act now contained in sec. 1625. It must be remembered, however, that both these provisions have been inserted in the Vermont Statutes by one act of the Legislature. But it is not necessary to consider the effect of these successive enactments, nor inquire as to the present state of the law applicable to railroad appeals. The

Legislature has, by the act of 1896, referred to sec. 3821 as it stands in the revision, and made it the law of all cases arising under that act. We conclude, therefore, that the case is not properly before us, and that the petitioners must stand upon such rights as they may have relative to the judgment of the County Court.

Exceptions dismissed.

CHESHIRE BEEF CO. v. GEORGE C. THRALL.

January Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed August 31, 1899.

Limited guaranty—A guaranty of goods to be purchased in the future to the amount of \$700, when the language used is equally applicable to a limited and to a continuing guaranty, will be construed to be the former, and the guarantor's liability will be confined to the first seven hundred dollars' worth of goods thereafter purchased.

Guaranty—Rule of construction—A guarantor without valuable consideration should not be subjected to an increased liability by legal implication, and to give a guaranty a continuing effect, the language employed should be sufficient to indicate it.

ASSUMPSIT on a guaranty. Plea, general issue with notice. Trial by court. Rutland County, March Term, 1898, *Start*, J., presiding. Judgment for defendant. Plaintiff excepted.

Prior to October 31, 1895, the plaintiff had sold beef to one Judson H. Grant. On that day the plaintiff and Grant settled, and their accounts were closed and paid up to that date, and thereupon the defendant executed and delivered to the plaintiff the following writing:

Rutland, Vt., October 31, 1895.

This is to certify that I, George C. Thrall, of Rutland, Vt., will be responsible to the amount of \$700.00 to the Cheshire Beef Co., for goods purchased by Judson H. Grant of Rutland, Vt. In case of failure of said Grant to meet this obligation, I guarantee its payment.

Geo. C. Thrall,
Surety.

On the same day the plaintiff sold and delivered to Grant a bill of beef amounting to the sum of \$404.66. Between said last named date and January 28, 1896, the plaintiff sold and delivered to Grant beef to the amount of \$3212.05, and between said dates Grant paid to the plaintiff \$2528.23, at different times and in different sums. On said 28th day of January, 1896, there was due the plaintiff for beef thus sold and delivered to Grant, \$683.82, which sum remained unpaid at the time of the trial.

The beef in question was sold and delivered to Grant, by the plaintiff, on the strength of the defendant's guaranty.

Butler & Maloney for the plaintiff.

Joel C. Baker for the defendant.

MUNSON, J. The defendant agreed in writing to be responsible to the plaintiff as a guarantor "to the amount of \$700," "for goods purchased by Judson H. Grant." The question raised is whether this was a limited or a continuing guaranty. The circumstances connected with the giving of the guaranty plainly require that the words "goods purchased" be given a future significance. The language thus construed is equally applicable to both kinds of guaranty. We find nothing in the case that affords further aid in determining what was intended. There has been no practical construction by the parties, such as was considered controlling in *Michigan State Bank v. Peck*, 28 Vt. 200. It thus becomes necessary to determine what rule of construction shall prevail when the language is ambiguous, and the

circumstances afford no basis for a fair presumption as to the mutual understanding of the parties.

It is said by some authorities that the contract of guaranty should be construed liberally in favor of its purpose ; that the words used should be taken as strongly against the guarantor as their sense will permit ; and that if one intends to be surety only for a single dealing he should be careful to say so. It is said by other authorities that the scope of a guaranty should be restricted to the plain and obvious import of its language ; that a mere surety should not be held to pay the debt of another by any forced construction ; and that in a doubtful case the presumption should be against the construction that the guaranty is continuing. It is said by some that the courts seem inclined to favor an extension of the liability in cases of doubt, while others say that the decided weight of authority is in favor of the restrictive rule. We are not aware that this court has passed upon the matter ; although an expression of Judge Bennett in *Noyes v. Nichols*, 28 Vt. 159, has led a text-writer to infer that it favored the view first stated. But we think it is the more reasonable conclusion that one who becomes a guarantor without valuable consideration should not be subjected to an increased liability by legal implication, and that the burden should be upon the one who desires a continuing guaranty to see that the language employed is sufficient to indicate it. We hold that the defendant's liability was limited to the first seven hundred dollars worth of goods purchased.

Judgment affirmed.

GEORGE M. WEBSTER v. EDWARD T. SMITH.

SAME v. SAME.

October Term, 1898.

Present: Ross, C. J., MUNSON, START and THOMPSON, JJ.

Opinion filed August 31, 1899.

Oral testimony in connection with a written instrument—Witnessed note.—Oral testimony is admissible to show that a note, purporting to be witnessed, was not a witnessed note when delivered. The rule with regard to oral evidence to vary a written instrument has no application when the legal existence or binding force of the instrument is in question.

New trial—Surprise—One party misled by the other.—Defendant misled the plaintiff as to his defence, which when made was a surprise to the plaintiff, and could be met only by a witness first made known to the plaintiff by the defendant's testimony. Plaintiff having failed on a motion for a continuance that he might improve this witness, and an affidavit of the witness being introduced showing that her testimony would meet the defence, a new trial was on the petition of the plaintiff granted.

THE ORIGINAL ACTION was assumpsit on a note. Pleadings referred to but not furnished the reporter. Trial by court, Washington County, September Term, 1897, *Tyler*, J., presiding. Judgment for defendant upon facts found. Plaintiff excepted.

On trial the plaintiff produced the note sued on, which bore the name of one Allen Perry as witness, and introduced evidence tending to show that the note was witnessed according to the statute when it was executed and delivered.

The defendant, against objection, was permitted to testify that the note was not a witnessed note when it was delivered, and the admissibility of this evidence was the sole question raised by the exceptions.

J. P. Lamson for the plaintiff.

S. C. Shurtleff for the defendant.

MUNSON, J. It was not error to permit the defendant to testify that the note in suit was not a witnessed note when delivered. The rule which prohibits the introduction of parol evidence to vary a written instrument has no application when the legal existence or binding force of the instrument is in question. This evidence was not offered to vary the defendant's writing, but to show that the note as presented was not his writing.

Judgment affirmed.

A PETITION FOR A NEW TRIAL in the above case, brought to the Supreme Court by the plaintiff therein, was heard with the case on the bill of exceptions. The opinion states the case on the petition.

J. P. Lamson for the petitioner.

S. C. Shurtleff for the petitionee.

MUNSON, J. The note in suit purports to have been witnessed by Allen Perry. Defendant told plaintiff's counsel before the trial that Perry's name was not in his handwriting; and the case was prepared upon the theory that the defense would accord with this statement. On trial, to the plaintiff's surprise, the defendant testified that Perry's signature was genuine, but that Perry's wife was the only one present when the note was executed, and that the subsequent affixing of Perry's name was without authority. The plaintiff thereupon moved for a continuance to enable him to procure the attendance of Mrs. Perry, which motion was overruled. Neither the plaintiff nor his counsel knew that Mrs. Perry was present at the execution of the note until the defendant so testified. The plaintiff now produces in support of his petition the testimony of Mrs. Perry that her husband was present when the note was executed, and affixed his name as a witness in defendant's presence. This presents a case which entitles the plaintiff to a new trial.

New trial granted.

MARY E. PALMER v. ORVILLE LAWRENCE, et al.

October Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON and START, JJ.

Opinion filed August 31, 1899.

Evidence—An endorsement on a note in the handwriting of a deceased owner, being conceded to be evidence to show which of two notes a certain payment was applied on, and it not appearing that it was received in evidence for any other purpose, the objection that it was inadmissible to show on which of the two notes the payment was in fact made was not considered.

CHANCERY. Foreclosure of mortgage. Caledonia County, December Term, 1899, *Thompson*, Chancellor. Decree for oratrix. Defendants appealed.

The case was heard on petition, answer, report of special master, and exceptions thereto. The facts are stated in the opinion.

Bates, May & Simonds for the oratrix.

Dunnett & Slack for the defendants.

MUNSON, J. In arriving at the amount of the decree, the master excluded from the computation an item of two hundred dollars, which the defendants claimed should be applied in reduction of the mortgage debt. It appears that the mortgage in suit was formerly owned by a person who died before the hearing, and that this person held at the same time another mortgage against the same debtor, which was known as the *Blancher* mortgage. The defendants presented the receipt of this deceased person for two hundred dollars, and claimed that the money received for was paid upon the mortgage in suit, while the oratrix claimed that it was paid and applied upon the *Blancher* mortgage. Upon this question, and in connection with evidence of handwriting and identity of payment, the master received the

Blancher note in evidence. The defendants insist that its admission was error.

It is said in defendants' brief that the fact that this payment was endorsed on the Blancher note was not questioned, and that the controverted point was whether it should have been endorsed there, and that consequently the endorsement must have been received as a written declaration of the deceased owner that the application was correct. But the fact of its having been so applied cannot have been conceded in advance of evidence, for the report states that the note was received in connection with evidence that the payment represented by the receipt was the payment so endorsed. So it cannot be said but that the note was offered as showing how the money represented by the receipt was in fact applied, and we do not understand the defendants to question its admissibility for that purpose. There is nothing in the report to indicate that the master received or used it for any other purpose.

Decree affirmed, and cause remanded.

COURT OF INSOLVENCY v. M. H. ALEXANDER, et al.

October Term, 1898.

Present: ROSS, C. J., TAFT, TYLER, MUNSON and START, JJ.

Opinion filed August 31, 1899.

Insolvency bonds—Separate bonds having been voluntarily given by joint assignees in insolvency under an order which did not require separate bonds, the obligors cannot avoid liability by saying that the statute contemplated a joint bond.

Assignees—Joint default—Co-assignees having been charged by the court of insolvency with the possession of a fund and the duty of payment, a default in respect to such payment is a joint default.

Joint default—Separate bonds—The joint default of assignees is to be treated as the several default of each as far as the remedy on the assignees' bonds is concerned, when separate bonds have been voluntarily given; and the creditors may pursue either bond to full satisfaction.

Harmless evidence—In case of such joint default, and suit on a separate bond, evidence to show that the conversion of money which constituted the default was in fact by the principal of the bond sued on, is immaterial and harmless.

ACTION on a bond given to the Court of Insolvency. Chittenden County, March Term, 1898. *Thompson, J.*, presiding. Judgment for the prosecutors. Defendants excepted.

One Arthur W. Huntley was adjudged to be an insolvent debtor by the Court of Insolvency for the District of Chittenden, and the defendant, Alexander, and one Nichols, were duly elected assignees of the estate in insolvency of said Huntley, and acted as such. The court required them to give a bond with sufficient surety, in the sum of two thousand dollars, for the faithful discharge of their duties as assignees. Thereupon each assignee gave his separate bond, with surety, the defendant, Lowrey, being surety on the bond given by said Alexander. These bonds were accepted by the court.

On the filing of the assignees' account, the court found the sum of one thousand four hundred and twenty-two dollars and eighty-one cents to be in their hands, and made an order by which they were directed to pay certain sums in dividends to the creditors of said insolvent estate who had proved their claims, among whom were the prosecutors in this suit, to whom the assignees were directed by said order to pay specific sums of money to which they were entitled. Said prosecutors were never paid any part of said sums by either of the assignees.

On evidence admitted *pro forma*, under objection by the defendants, the County Court found that at the time distribution was ordered as above stated, the assignee, Alexander, had in his possession the funds with the possession of which both assignees were charged, and had ever since retained the same, and that no part thereof had since come into the hands of the assignee,

Nichols, Alexander having contrived to get sole possession of such funds at some time prior to the order of distribution.

The validity of the separate bonds, under the statute applicable thereto and the order of the court, the right to pursue the bond in suit, and the admissibility of the evidence received under objection, were the questions made in the case.

Cushman & Mower for the plaintiff.

J. J. Monahan and *George W. Kennedy* for the defendant.

MUNSON, J. The order of the Court of Insolvency required the assignees to give a bond with sufficient surety in the sum of two thousand dollars. The assignees tendered separate bonds of the required amount, which were accepted by the court. The order did not require the giving of separate bonds, and there is no ground for saying that the bonds given were extorted by assumed authority. Separate bonds having been voluntarily given, the obligors cannot avoid liability to the creditors by saying that the statute contemplated a joint bond.

The Court of Insolvency found a certain amount in the hands of the assignees for distribution to the creditors, and made an order by which the assignees were directed to pay certain sums to the prosecutors herein. It will be noticed that the order charges both the assignees with the possession of the funds and the duty of payment; and the default arising from the failure to comply with this order must necessarily be a joint default. But this joint default of the assignees involved the neglect of each, and it is to be treated as the several default of each as far as the remedy is concerned, for the obligors have voluntarily contracted that it may be so treated. It necessarily follows that the creditors may pursue either bond until full satisfaction is obtained.

It is not necessary to consider what, if any, remedy the obligors of the bond sued upon may have against the obligors of the other bond.

The evidence received to show that the misappropriation was in fact by the principal of the bond sued upon, was both immaterial and harmless.

Judgment affirmed.

VIVIAN BARRETT v. F. L. FISH.

May Term, 1899.

Present: TAFT, C. J., TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed August 31, 1899.

Production of private letters for purposes of public justice—For the purposes of public justice regularly administered, the production of private letters in other hands than the writer's may always be compelled, unless the letters would tend to criminate the one required to produce them.

Equity will not enjoin—When for such purposes their production might be compelled, a court of equity will not restrain their voluntary production for the same purposes.

The general rule in equity recognized—Such a case constitutes an exception to the rule that equity will enjoin an unauthorized publication of private letters.

Seizure of papers—That a person to whose custody private letters have been confided, commits a breach of trust in delivering them to another, does not make the receiving of them by such other an unlawful search and seizure.

Possessor a state's attorney—That the possessor of private letters tending to criminate the writer is a state's attorney, is immaterial upon the question of their publication by production in court.

CHANCERY. Addison County, June Term, 1898. *Thompson*, Chancellor. Decree strictly *pro forma* in accordance with the prayer of the bill. Defendant appealed.

The oratrix brought her bill to enjoin the defendant from the publication, by production in court, of certain letters written

by her and in his possession. The case was heard upon bill, answer and an agreed statement of facts. The opinion states the case thus presented so far as it was material to the decision.

Button & Button and *H. C. Shurtleff* for the oratrix.

A brief for the oratrix prepared by *Stephen C. Shurtleff*, deceased, was also submitted.

F. L. Fish, defendant, *pro se*.

THOMPSON, J. From the agreed statement of facts, the allegations of the bill of the oratrix, and the admissions in the defendant's answer, it appears that the papers in controversy are unsigned letters, written by the oratrix to one Poland, and by him to her; that they were in her possession until shortly before August 21, 1897, when she committed them to the custody of one Hyde with directions to burn them, that while they were in his possession, he delivered them to F. A. Howland, August 21, 1897, and subsequently and before the commencement of this suit, Howland delivered them to the defendant who has ever since retained possession of them against the will of the oratrix. The defendant admits that he intends to publish the letters by using them as evidence in the prosecution of a joint information against the oratrix and Poland by which they are charged with committing adultery with each other, which criminal proceeding is now pending in Addison County Court; that the contents of the letters tend to show that there has been undue familiarity and criminal intimacy between the oratrix and Poland; and that she is privileged from producing the letters on trial unless she should be improved as a witness in her own behalf.

Although counsel for the oratrix have argued the case as if the question of an unlawful search and seizure of her private papers were involved, it is sufficient to say that that question is not involved, as the letters were voluntarily delivered to Howland by the agent of the oratrix. That such delivery was a flagrant breach of trust by Hyde, cannot make the receiving of the letters by Howland an unlawful search and seizure.

It is not claimed by the defendant that the letters themselves were implements by which the alleged crime was committed. Hence, it is unnecessary to discuss or decide in respect to the right of prosecuting officers to seize, or to retain such instruments, when they come into their possession, for use as evidence on the trial of the person charged with the crime, in the commission of which such instruments were used.

The fact that Howland was the State's Attorney of Washington County, and that the defendant was State's Attorney of Addison County at the time the letters were taken by Howland and by him delivered to the defendant, gave neither of them any right to take and hold the letters against the will of the oratrix. Nor does the fact that the defendant is still such State's Attorney in any way affect the rights of the parties to this suit. He holds them the same as any other person would hold them under like circumstances. As to the defendant, the oratrix is the owner of the letters. It is clear that a court of law will take no notice on trial of a respondent, how letters or other papers offered in evidence, were obtained, for the purpose of determining their admissibility in evidence. *State v. Mathers*, 64 Vt. 101; *Jordan v. Lewis*, 2 Strange 1122; *Stockfleth v. De Tastet*, 4 Camp. 10; *Gindrat v. People*, 138 Ill. 103; *State v. Atkinson*, 40 S. C. 363; *State v. Griswold*, 67 Conn. 290; *Williams v. State*, 100 Ga. 511; *Legett v. Tollervey*, 14 East 302; 1 Green. Ev. sec. 254a. Consequently the oratrix is remediless at law in the premises, if she is entitled of right not to have the letters published by being read in evidence on her trial for the alleged crime.

A court of equity has jurisdiction to restrain the publication of manuscript writings and the like, against the will of the writer or owner. While there is some conflict among the authorities as to whether that court will restrain the publication of private letters, by a person not authorized to do so by the writer or owner thereof, the view most consonant with reason, justice and sound public policy, is that which holds that a court of equity will pro-

protect the right of property in such letters, by enjoining their unauthorized publication by any person who may attempt or intend such publication. Such protection is based solely on the property of the writer or possessor of such letters therein. 2 Story Eq. Juris. (13th ed.) 948, 949; 2 Beach Inj. sec. 902; 3 Pom. Eq. Juris. (2nd ed.) sec. 1353; *Granard v. Dunkin*, 1 Ball & B. 207; *Lytton v. Dewey*, 54 L. J. Ch. 293; *Gee v. Pritchard*, 2 Swanston 419; *Folsom v. Marsh*, 2 Story 100; *Woolsey v. Judd*, 4 Duer 380; *Grigsby v. Breckinridge*, 2 Bush 480; Hilliard Inj. (2nd ed.) 478; note to *Hoyt v. Mackenzie*, 49 Am. Dec. 180-184.

One of the exceptions to this rule is that "for the purposes of public justice publicly administered, according to the established institutions of the country," private letters in the hands of a party other than the writer, must always be produced unless such letters would tend to criminate the person required by law to produce them. *Gee v. Pritchard*, 2 Swanston 427; *Hopkinson v. Burghley*, L. R. 2 Ch. App. 447; 2 Story Eq. Juris. (6th ed.) sec. 948. In *Hopkinson v. Burghley*, *supra*, the writer of private and confidential letters, relevant to the issue, refused his sanction to their production in court, by the person to whom they were written and sent, but the court held that they must be produced "for the furtherance of the ends of justice," although the writer was not a party to the suit. While the letters in question were in the hands of Hyde, the agent of the oratrix, they were not privileged from production in court by him, on the trial of the oratrix and Poland, but if he still held them and declined to voluntarily produce them, he could be compelled by a subpoena *duces tecum*, to produce them in court to be used as evidence at their trial. Assuming that the defendant has no better right to the possession of the letters than Hyde would have, were they still in his possession, yet the defendant could be compelled to produce them on trial, if he were unwilling to do so, were they in his possession when summoned legally to produce them. He is willing to do voluntarily for the further-

ance of public justice, administered in due course according to law, what he might be compelled to do. No rights of the oratrix have been infringed by an unlawful search and seizure. By her own folly, important evidence against her and Poland was placed in the hands of Hyde, and through his action it has come to the possession of the defendant. It is apparent that the sole purpose of this proceeding is to enable the oratrix to obtain possession of this evidence that she may suppress or destroy it, so that peradventure, the ends of justice may be thwarted. The case falls clearly within the exception stated, and the prayer of the bill cannot be granted.

Pro forma decree reversed and case remanded with mandate that the bill be dismissed.

STATE v. INTOXICATING LIQUOR, JOHN JABBOUR, Keeper.

January Term, 1898.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON
and WATSON, JJ.

Opinion filed September 13, 1899.

*Intoxicating liquor.—Rights of person apprehended as owner or keeper—*One apprehended and brought before a magistrate under V. S. 4490, is entitled, without filing a claim or giving security, to cross-examine and produce witnesses, and to be heard, by himself and counsel, as to any fact bearing upon his liability for costs.

SEIZURE of intoxicating liquor under statutory warrant. John Jabbour was apprehended and brought before the court as owner and keeper. City Court of Barre, November 4, 1898, *Barney, J.* Judgment condemning the liquor seized and holding Jabbour for the costs of the proceedings. Jabbour excepted.

On hearing Jabbour claimed the right, and offered, to cross-examine the witnesses for the State as to the place where the seizure was made, in respect to its character as a place of public resort, as to the particulars of the search of such place, as to the purpose for which the liquor was kept, and as to the ownership of the liquor. He also offered evidence in his own behalf to prove that he was not the owner, keeper or possessor of the liquor seized. On the evidence introduced by the State he offered and asked permission to argue that he was not the owner, keeper or possessor of the liquor seized and could not be held for costs.

The court ruled against each claim, offer and request of Jabbour above set forth, holding that he could have no standing in court without making a written claim and entering into a recognizance for costs.

Alland G. Fay for the State.

Richard A. Hoar for Jabbour.

MUNSON, J. One apprehended and brought before a magistrate under V. S. 4490, is entitled, without filing any claim in writing or giving any security, to cross-examine the witnesses produced by the State, and to be heard by himself, witnesses and counsel, as to any fact that would relieve him from the costs therein provided for.

Exceptions sustained, judgment against Jabbour reversed, and cause remanded.

FRED H. FARRINGTON v. RUTLAND RAILROAD COMPANY.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START and WATSON, JJ.

Opinion filed September 23, 1899.

V. S. 3926—Prima facie evidence of negligence—The fact that a fire caught from sparks thrown from the stack of a locomotive engine on a railroad, is, under V. S. 3926, *prima facie* evidence of negligence on the part of the railroad company.

Burden of proof—In such case the burden of proof is on the railroad company to show that due caution and diligence were used and suitable expedients employed to prevent injury from fire.

Question of negligence for the jury—Testimony having been introduced by the defendant railroad company tending to show such caution and diligence and the employment of such expedients, it was for the jury to determine the question of negligence in the light of all the evidence in the case, and a motion to have a verdict directed for the defendant was properly overruled.

Duty of railroad company. No duty based on conjecture—A railroad company is required to use the best appliances for safety which have been tested and are in known practical use; but no duty can be predicated upon a conjecture that the company could have devised some appliance better than any in known practical use.

ACTION on the case—Rutland County, September Term, 1898. *Thompson, J.*, presiding. Plea, general issue. Trial by jury. Verdict for plaintiff. Defendant excepted.

The plaintiff sought to recover damages on account of the burning of certain of his buildings. The case is sufficiently stated in the opinion.

Joel C. Baker for the plaintiff.

Frederick H. Button for the defendant.

WATSON, J. At the close of the evidence, the defendant moved for a verdict for that there was no evidence to sustain the claim of the plaintiff; for that the defendant had established

that it used due care, caution and diligence, and employed suitable expedients to prevent said fire and that such facts were not controverted by the plaintiff, and that the plaintiff had introduced no evidence to controvert such showing. The motion was overruled and the case submitted to the jury, to which defendant excepted. In this, was there error?

It was conceded by the defendant that the fire on the occasion in question caught from sparks thrown from the stack of the engine No. 207, drawing train No. 22, in the grass in Manchester's meadow, and that it spread to Manchester's barn and the plaintiff's barn caught from sparks from Manchester's barn.

The fact that the fire was caused as conceded, was *prima facie* evidence of negligence on the part of the defendant; and this negligence may have been in the construction of the engine, the condition of it, the placing it in charge of unskilful and imprudent persons, or in the management of the engine in an unskilful and imprudent manner. And to relieve itself of responsibility in damages for the property injured thereby, the burden was then upon the defendant to show that due caution and diligence were used and suitable expedients employed to prevent such injury. Sec. 3926, V. S.; *Clevelands v. Grand Trunk Ry. Co.*, 42 Vt. 449.

With the plaintiff's case thus made out, the defendant introduced evidence tending to show that the engine was properly constructed, in suitable condition, and in charge of experienced persons; and its evidence tended to show that the engine was drawing a freight train of a certain number of cars, and what was done in the management of the engine. Evidence was also introduced by the defendant tending to show, somewhat in detail, the facts and circumstances relative to the sparks escaping and falling into the dry grass in Manchester's meadow and setting the same on fire, &c.

This was all matter of defence, but whether, in the light of all the evidence in the case, the defendant exercised due caution and diligence and employed suitable expedients to prevent the

injury to the plaintiff's property, was a question for the jury to determine, and the motion for a verdict was properly overruled. *Gleeson v. Virginia, etc., Ry. Co.*, 140 U. S. 435; *Houston v. Brush*, 66 Vt. 331; *Latremouille v. Bennington, etc., Ry. Co.*, 63 Vt. 336; *Bryant v. Central Vt. R. R. Co.*, 56 Vt. 710; *Vinton v. Schwab*, 32 Vt. 612.

The defendant excepted to the part of the charge, that :

"If you find in view of all the evidence, in the way in which that engine could be operated feasibly, in view of the evidence that it, as a careful, prudent man ought to have used something that would have more effectually prevented the emission of sparks, that it could reasonably and practically have done so, and that with its knowledge in that behalf, as a careful, prudent man, seeking honestly to prevent injury in that way, could have devised something more practical, then it was its duty to use such expedients as would more effectually lessen the liability to cause fire therefrom."

The defendant's uncontroverted evidence tended to show that the engine was supplied with the appliances in general use, by it and other railroads, for preventing the escape of sparks and known as a perforated plate; that the engine was inspected every day and was in good condition; that no better spark arrester was known to the defendant; and that it was not possible to construct an engine and protect it in a way to generate sufficient steam to operate it, that would not throw sparks. But, notwithstanding the uncontroverted evidence in this regard, the jury were instructed to find whether the defendant as a careful, prudent man, ought to have used something that would have more effectually prevented the emission of sparks, whether it could reasonably and practically have done so, and whether it could have devised something more practical; and that if the jury found these facts in the affirmative, it was the duty of the defendant to use such expedient as would more effectually protect the discharge of sparks and thereby lessen the liability to cause fire therefrom. This was instructing the jury to con-
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ture and thereon base findings of facts upon which to found a right of recovery, and was error. *Driggs v Burton*, 44 Vt. 124.

Although the duty of a railroad company, in this regard, seems not to have been expressly defined by the court of this State, it is not a new question, and is well stated in *Flinn v. New York, etc., R. R. Co.*, 142 N. Y. 11, as follows :

“The duty of the company to use reasonable care in order to avoid injury resulting to others from the exercise of its powers requires it to avail itself of the best mechanical contrivances and inventions in known practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engines ; and it is liable for injuries caused by its omission to use them. Its duty in this respect is limited to such contrivances as have been already tested and put in use, and it is not required to use every possible contrivance, although already patented and recommended in scientific discussions.”

By this rule, the defendant was required to use the best tested spark arrester in known practical use, but it was not bound to test or put in use every possible or new contrivance, and when using the best tested known appliance in practical use, to say that if the defendant could devise something more practical it was its duty to use such devised expedient, was measuring its duty by a rule impractical in principle and unsafe to adopt.

The other questions raised by the exceptions are not considered.

Judgment reversed and cause remanded.

Taft, C. J., not voting.

STATE v. ISAAC H. P. ROWELL.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON
and WATSON, JJ.

Opinion filed November 6, 1899.

Perjury—Insufficient indictment—Perjury may be committed on a trial under an indictment which is afterwards held insufficient.

Perjury—Indictment bad for uncertainty—While perjury may be assigned by reciting the false testimony relied on, an indictment is bad for uncertainty which recites testimony in the course of which the false testimony is alleged to be found, but which fails to point out in what specific answers the alleged perjury is contained.

INDICTMENT for perjury. Washington County, March Term, 1899, *Thompson*, J., presiding.

The respondent pleaded in bar of the indictment that the alleged perjury consisted of testimony given by him in a former trial upon an indictment which was insufficient, and was afterwards quashed for insufficiency. To this plea the State filed a demurrer which was sustained, and the plea adjudged insufficient. The respondent was then ordered to plead over, and filed a general demurrer to the indictment, which was overruled, and the case passed to the Supreme Court before final judgment. All the rulings of the trial court were made *pro forma*.

Richard A. Hoar, State's Attorney, for the State.

Geo. W. Wing and *T. R. Gordon* for the respondent.

TYLER, J. The respondent was indicted for perjury at the September Term, 1896, Washington County Court. He filed a demurrer to the indictment, which was overruled, and he was ordered to plead over, without prejudice to the demurrer, and he thereupon pleaded not guilty, was tried by jury at the following March Term and convicted. Sentence was respited, and the cause was passed to the Supreme Court, was heard at the January

Term, 1898, when the demurrer was sustained and the indictment quashed.

The present indictment was found at the September term, 1897, while the former one was pending in the Supreme Court, and charges the respondent with perjury in testifying in the trial upon that indictment.

I. The first question is whether perjury can be committed in testifying in a trial upon an indictment which is finally adjudged insufficient.

Perjury is defined by Mr. Bishop as the wilful giving under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry. 2 Bish. New Cr. Law, sec. 1015.

The testimony in this case having been given in a judicial proceeding, the court having jurisdiction of the parties and of the subject matter, and the testimony being material to the issue, the elements of the crime of perjury seem to be made out, if well alleged.

The respondent, however, contends that by reason of the insufficiency of the indictment, the trial was only a mistrial, that the proceeding was void, that the court had not jurisdiction of the subject matter of the suit to render a judgment of which the respondent could avail himself in a subsequent prosecution for the same cause—that there was no issue to which the testimony was material.

It is true that in an extra-judicial proceeding, where an oath could not lawfully be administered, perjury by falsely testifying could not be committed. This was so held in *Rex v. Cohen*, 1 Stark. 416, cited in 1 Bish. New Cr. Law, sec. 440, n. There a statute provided that upon the death of a co-plaintiff the suit should abate unless the death was suggested upon the record, and a co-plaintiff dying after issue joined without such suggestion, a trial was extra-judicial, and perjury could not be assigned upon any false testimony given. And in *Commonwealth v. White*, 8 Pick. 452, a justice of the peace tried and convicted a person for

a certain misdemeanor under a statute that had been abrogated by a subsequent one, which gave jurisdiction to the Court of Common Pleas; *held*, that the whole matter was *coram non judice*, that an oath could not lawfully be administered, and therefore the defendant could not have committed perjury in testifying. Numerous cases of this kind might be cited, where the proceedings being void, it was held that perjury could not be assigned. In this case the indictment was regularly found, the trial court held it sufficient and tried the respondent upon it, but this court held it insufficient in not alleging that the writing, which the respondent was charged to have sworn falsely to was one which the law required to be verified by oath. A judgment upon a verdict of guilty would have been valid unless reversed, and a judgment upon a verdict of acquittal would have been a bar to another prosecution for the same offense.

The trial court had power to hear and determine the cause and this constituted jurisdiction of the subject matter. *Vaughn v. Congdon*, 56 Vt. 111; *Perry v. Morse*, 57 Vt. 509. The case, therefore, is entirely different from one where the oath is administered by a person having no legal authority for so doing, as by a person acting merely in a private capacity, or who has authority to administer certain oaths but not the one in question, or by one who has authority seemingly colorable, but which is in fact unwarranted and merely void. In such cases the oath is not perjury, for it is altogether idle. 1 Russ. on Cr., 2nd ed., 520. The case is not different in principle from one where there is a mistrial by reason of error in the admission or rejection of evidence, or in instructions to the jury, or where judgment is arrested by reason of a defect in the declaration, in which cases it could not be seriously contended that false testimony did not constitute the alleged crime.

If the crime of perjury consisted wholly of the wrong done in procuring an unjust verdict, there would be a semblance of reason in claiming that when the verdict was set aside by reason of an insufficient indictment the proceeding was a nullity, and

perjury had not been committed. But a wrong verdict, though it may be the result of perjury, is not its essence. All the authorities agree that a prosecution for the offense is not grounded upon the injury or inconvenience which an individual or the public may sustain, but upon the abuse and insult to public justice. 2 Chit. Crim. Law, 157; 7 Bac. Abr. 426. Accordingly it is held that it is immaterial whether the false oath is credited by the triers of the fact or not, or whether the person to whose prejudice it was taken is damaged by it or not. Bac. Abr. *supra*; 2 Bish. New Cr. Law, sec. 1028.

So it has been held that a witness is guilty of perjury who testifies falsely to a material fact, although he was not competent as a witness in the case, or to prove the particular fact concerning which he testifies. *Chamberlin v. People*, 23 N. Y. 85; 80 Am. Dec. 255.

It is laid down in 2 Russ. on Cr., 6th ed., 318, that perjury may be committed on the trial of an indictment which is afterwards held bad upon a writ of error, and *R. v. Meek*, 9 C. & P. is cited as authority. There it was objected that the evidence of the defendant could not have been material, as the former indictment was held bad upon a writ of error for an insufficient assignment of perjury, but the objection was overruled, the court remarking that it would be rather too much to say, that whether a witness had committed perjury or not, could depend upon the validity in point of form of the indictment as to which he had testified. The ruling sustaining the State's demurrer to the respondent's plea was correct.

II. This indictment is demurred to as insufficient. The simplified form under No. 29, Acts of 1890, V. S. 5417, form 48, is :

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| <p>"STATE OF VERMONT, COUNTY, ss. County Court begun and held at.....within and for the county of.....aforesaid, on the....day of.....</p> | } | <p>Be it remembered that at a term of the</p> |
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A. D....., the grand jurors within and for said county of.....upon their oath present, that A. B. of..... in the county of....., at..... in the said county of.....on the....day of.....in the year of our Lord eighteen hundred and.....appeared as a witness in a proceeding in which C. D. and E. F. were parties, then and there being heard before a tribunal of competent jurisdiction, and committed the crime of perjury, by testifying in substance as follows: (Here set out the matter sworn to and alleged to be false,) which said testimony was material to the issue then and there pending in said proceeding, against the peace and dignity of the State."

This form is followed in the present case down to and including the charge that the respondent "committed the crime of perjury," where it is alleged that he "then and there falsely testified in answer to interrogatories substantially as follows," and then follows more than six hundred questions to and answers by the respondent, covering nearly forty printed pages, and concluding with the words, "which said testimony was material to the issue then and there pending in said prosecution, contrary to the form of the statute," etc.

The indictment, without the testimony, only alleges that the respondent was a party to a proceeding tried in the County Court; that he appeared as a witness therein, and that being sworn to tell the truth relative to such proceeding, he committed the crime of perjury, and the alleged false testimony is recited to show the crime.

The indictment cannot be held good unless it can be construed to allege that the respondent swore falsely in his answers to each and every interrogatory. It cannot be so construed. It would be absurd to give it the construction that he swore falsely about his name and residence, for they are given by him the same as they are stated in the body of the indictment. Neither is it presumable that it was intended to charge that he swore falsely when he testified that he was a tax payer in Montpelier, and as such, in the year 1895, made out and signed his inventory

and handed it to one of the listers. The same may be said of many other answers given by him in the course of his examination.

There being no designation of the matter or matters in the respondent's testimony that are claimed to be false, the indictment is bad for uncertainty. It does not apprise him of the cause and nature of the accusation against him.

The state relies upon *State v. Camley*, 67 Vt. 323, as authority for sustaining this indictment, for there, when the specification of perjury is reached, certain questions and answers are recited, which do not appear in the published case. While that case is authority for holding that the perjury need not be assigned otherwise than by reciting the testimony, it is not authority for holding that a great mass of testimony may be thrown into an indictment without pointing out in what answers to questions the alleged perjury is contained.

The pro forma ruling is reversed; demurrer sustained; indictment held insufficient, and quashed.

BARTON NATIONAL BANK, et al. v. G. W. ATKINS, et al.

January Term, 1899.

Present: TAFT, C. J., TYLER, MUNSON, START and WATSON, JJ.

Opinion filed November 12, 1899.

Repeal by implication—Liability of stockholders.—Section 9 of the charter of the Vermont Investment and Guarantee Company providing, among other things, that its stockholders should be liable for the indebtedness of the corporation beyond their stock to an amount equal to the par value of their stock, was repealed by implication by No. 79, Acts of 1886, which was a revision of the whole subject matter of said section and was clearly intended as a substitute therefor.

Effect of repeal—Obligation of contracts.—Such repeal was prospective only in its operation, and did not affect the rights of creditors in respect to enforcing the payment of prior indebtedness, and therefore was not an impairment of the obligation of contracts.

Liability follows stock.—A statutory liability of stockholders for the indebtedness of the corporation passes, by a transfer of the stock, to the purchaser, in the absence of a controlling statutory provision.

Liability enforceable in equity.—Such liability is properly enforceable in equity, where alone a complete, convenient and comprehensive remedy can be obtained.

Liability to be enforced by receiver.—In the case of an insolvent corporation in the hands of a receiver, the proceeding in equity to enforce the stockholders' statutory liability should be by the receiver under the direction of the court.

Liability of estates of deceased stockholders, heirs, and legatees.—The liability of the stockholders being purely equitable commissioners upon the estates of deceased stockholders are without jurisdiction in the matter, and the liability is enforceable in equity against such estates, and against heirs and legatees into whose hands estates so chargeable have come.

Insolvency—Assignees.—The assignees in insolvency of a co-partnership, liable as a stockholder, are proper parties.

Insolvent estate of deceased partner.—In equity, the creditors of an insolvent partnership, one of whose members died pending the insolvency proceedings leaving his separate estate insolvent, when they have exhausted the effects of the partnership, stand on an equal footing with the personal creditors of the deceased partner in respect to the satisfaction of any unpaid balance of their claims out of the separate estate of the deceased partner.

Definition—Debenture.—The word "debenture" does not of itself import a secured indebtedness.

CHANCERY. Heard on bill, demurrers and plea, Orleans County, September Term 1898, *Munson*, Chancellor. By agreement of counsel and without hearing it was adjudged and decreed *pro forma* that the demurrers and plea be sustained and the bill dismissed. The orators appealed.

The case is stated in the opinion.

W. W. Miles for the orators.

W. L. Burnap and *Seneca Haselton* for the defendants generally.

Joel C. Baker for the defendant estates and heirs.

Charles M. Wilds and *E. J. Ormsbee* for the defendants Farrington and Thayer as assignees of G. and F. E. Briggs, co-partners, and as administrators of F. E. Briggs.

WATSON, J. The allegations in the bill show, among other things, that the Vermont Investment and Guarantee Company was organized under a special act of the Legislature of this State, approved November 10, 1884, section nine of which reads:

"This corporation shall not transact business until at least twenty-five thousand dollars of its capital stock has been actually paid in; and no part of the capital stock shall be withdrawn so long as the corporation has any unpaid or outstanding indebtedness or liability; and for any injury or damage coming to any person or party from a violation of the provisions of this act, the stockholders shall be personally liable, and such injury or damage may be recovered by such person or party in an action on the case, founded on this statute, and the stockholders shall be personally liable for the indebtedness of the corporation beyond their stock, to an amount equal to the par value of their stock."

That the company did business until the first of May, 1893, when it became wholly insolvent and unable to pay its debts, and having a large number of creditors in this and many other states, among whom were the orators; that at the June Term, A. D. 1893, of the Court of Chancery in the County of Addison, upon proper proceedings for that purpose brought by a creditor and stockholder of the company, E. J. Ormsbee was duly appointed receiver of said company, accepted the appointment, duly qualified, and took possession, by order of the court, of all the assets of the company which he has thus hitherto held; that, under an order of the court therein providing that creditors of the company who wished to become parties to the suit and share in the assets of the company should, on or before June 1, 1894, file with the receiver a statement of their several claims against the company, verified by oath, the orators presented their several claims for proof and allowance in accordance with the order, and the same were allowed

by the receiver; that on the first day of November, A. D. 1894, the receiver filed his report allowing the debts proved, and on the 11th day of February, A. D. 1898, the court ordered, adjudged and decreed that the report of the receiver be accepted and confirmed, and that the several claims therein reported for allowance, including those of the orators, be established as the indebtedness of the company, entitling the claimants to rank as creditors in the distribution of the assets of the company, the priority to be afterward determined; that the assets of the company are sufficient to pay only a small portion of the debts thus proved; that the defendants were stockholders of the company at the time it became insolvent and are all there were of such stockholders then residing in this state, and all there were in this state, to the knowledge of the orators, at the date of the bringing of this bill. The orators bring this action for themselves and all other creditors who may become parties thereto, to enforce the liability of the defendants as stockholders under that clause of section nine of the charter which reads, "And the stockholders shall be personally liable for the indebtedness of the corporation beyond their stock, to an amount equal to the par value of their stock."

The defendants, under their demurrer, contend, among other things, that this provision of the charter was repealed by No. 79, of the Laws of 1886, and therefore that the bill is without equity.

Such a repeal was not in express terms, and can only have been, if at all, by implication. By the law of 1886, all private corporations organized under special acts of the Legislature were made subject to the provisions of sections 3291, 3292, and 3293, R. L. By section nine of the charter, the corporation could not transact business until at least twenty-five thousand dollars of its capital stock had been actually paid in, and no part of the capital stock could be withdrawn so long as the corporation had any unpaid or outstanding indebtedness or liability, and for any injury or damage coming to any person or party from a violation of those provisions, the stockholders were personally liable in an action founded on that statute. By section 3291, R. L., one half

of the capital stock had to be paid in before the corporation contracted debts and no part of it could be withdrawn or diverted from the proper business of the corporation, and by section 3293, R. L., if the capital stock was withdrawn and refunded to the stockholders before payment of the debts of the corporation, each of such stockholders was personally liable to creditors whose claims remained unpaid, to the amount so refunded to him, to be recovered in an action founded on that statute. By section 3291, R. L., no debts could be contracted by the corporation exceeding in amount two-thirds of the capital stock actually paid in, and, by express terms, the act of 1886 was not to be construed to prevent corporations from contracting debts beyond that amount, when specially allowed to do so by their act of incorporation. Under the charter, the stockholders were personally liable for the indebtedness of the corporation beyond their stock, to an amount equal to the par value of their stock; while under section 3292, R. L., the stockholders were individually liable to creditors to an amount equal to the amount of stock held by them respectively, for contracts and debts made by the company, until the whole amount of stock fixed by the company was paid in. It will be noticed that, by the charter, the stockholders are liable for the indebtedness to an amount equal to the par value of their stock, without limitation as to time, while under section 3292, the liability is to the creditors in the same amount, but limited to the time when the whole amount of stock is paid in. Thus it is seen that the act of 1886 was a revision of the whole subject matter of section nine of the charter and clearly was intended as a substitute therefor. The latter was repealed thereby. *Farr v. Brackett*, 30 Vt., 344; *State v. Smith*, 63 Vt., 201.

It becomes important to determine what effect this repeal had upon the rights of creditors under the provision in question.

The law making stockholders personally liable for the indebtedness of the corporation is wholly statutory, and may be contained in a special charter under which the corporation is

organized, or in the general statutory law. Such a provision is entirely for the benefit of creditors and is, in effect, a requirement that the stockholders, by availing themselves of the advantages to be derived from such an organization, shall impliedly agree to be responsible for the debts of the corporation to the extent by law provided. And when the defendants became stockholders in the Vermont Investment and Guarantee Company, they impliedly agreed to pay the indebtedness of the corporation beyond their stock, to an amount equal to the par value of their stock. This provision with the capital of the corporation was the basis of its credit. The creditors contracted with reference to it. It became a part of the law of their contracts, and constituted security for any debt contracted by the company.

To take away the rights of creditors to enforce the payment of the prior indebtedness of the corporation, under this provision by its repeal, would be an impairment of the obligation of contracts which is prohibited by the Federal Constitution. *Hathorn v. Caley*, 2 Wall. 10; *Ochiltree v. Iowa etc. Co.* 21 Wall. 249; *Shreveport v. Cole*, 129 U. S. 36.

The allegations in the bill show that the original capital stock of the company was fixed at fifty thousand dollars and that after its organization and before its insolvency the capital stock was increased to three hundred thousand dollars; but whether this or any increase therein was made before the repealing act of 1886 took effect, does not appear. Creditors trusted the company and the members composing it only on the basis of the capital stock and the personal liability incident thereto, at the time the contracts were made. Beyond this the personal liability clause was no part of the law of the contracts made by the company and its repeal was not within the inhibition of the constitution. Persons dealing with the company had no right to assume that other stock would be taken. "The obligation of a contract within the meaning of the constitution is a valid, subsisting obligation, not a contingent or speculative one. It was no part

of the obligation of contract that future stock should be taken.”
Ochiltree v. Iowa etc. Co., supra.

The defendants contend, as a second ground of demurrer, that they are not liable under the charter provision, unless they were stockholders when the respective debts to the orators were incurred. With this we are unable to agree.

The fund subscribed by the stockholders at the time of the formation of the company was expected to be the company's sole working capital—a subsequent increase of stock might be voted—and the means of satisfying its creditors. The personal liability of the stockholders in no wise increased the working capital or the capital stock of the corporation. When a person became a stockholder by subscription, this liability rested upon him as an incident to his stock. He had a right, in good faith, to sell and transfer his stock and thereby relieve himself from liability as a stockholder, and, as such incident, this liability would follow the stock into the hands of the purchaser. It was inseparable therefrom. *Story v. Furman*, 25 N. Y., 214.

The corporation was a distinct legal entity, managing its affairs by officers and agents. Within the limits of the charter, it could hold property the same as an individual. It could contract debts, and in no sense were they the debts of the stockholders. It was the duty of the corporation to pay its debts, and if the stockholders are individually forced to pay them, they will be entitled to reimbursement from the corporate assets, if such there are. As between the corporation and the stockholders, the former is primarily liable for its debts; it is just and equitable that they should be paid from its assets, in the first instance; and to save circuity of actions, equity requires the creditors to resort to the primary debtor's assets first and to exhaust them before resorting to the liability of the stockholders. *Morawetz on Cor. sec. 883; Dauchy v. Brown*, 24 Vt. 197; 2 Eq. Lead. Cases, 273.

The debts of an insolvent corporation may have been largely contracted at a time when other persons were stockholders and

the company solvent. It may not have become insolvent for years after the then stockholders had sold and transferred their stock to other parties who, through mismanagement perhaps, were morally responsible for its insolvency. The extreme difficulty in adjusting the rights of creditors and stockholders on the basis that the latter are not personally liable unless they were such stockholders when the debts were contracted, and the inequity which might result from such adjustment, are sufficient reasons why, in the absence of statutory provisions governing it, the law should be construed to make the stockholders at the time of the insolvency of the corporation liable, without regard to who were stockholders when the debts were contracted. Such construction is consistent with the legal effect of a sale and transfer of stock. Mr. Morawetz says: "The right given by law to transfer shares in a corporation is held to include, by implication, a right to effect a complete novation of the contract of the holder with the other shareholders. The transferor is discharged from all liability to contribute to the company's capital, either for the benefit of the corporation, or for the benefit of creditors, and the transferee is rendered liable in his place. There is no reason why the right of transfer should not likewise be held to include a right to effect a novation of a special individual liability imposed upon the shareholders for the security of creditors alone." Morawetz on Cor. sec. 888.

Nor is the case of *Windham Provident Institution v. Sprague*, 43 Vt. 502, relied upon by the defendants in support of their contention in this regard, in conflict with the construction here given. In that case the plaintiff sought to recover its debt of the defendants under a section of the charter of the corporation in which they were directors and stockholders, which provided that the company should not at any time contract debts exceeding three-fourths the amount of its capital stock paid in; and if such indebtedness should exceed that amount, the directors and stockholders should be personally holden to the creditors of the company. The creation of this additional liability was held

to have been intended as a check upon the directors and stockholders in the contraction of debts, and to have been imposed as a penalty for the infraction of that provision in the charter, and that to visit that penalty upon others than those who caused the infraction would be unjust and unintended. There is a well recognized distinction between a liability under such a provision and a liability under a provision like the one here in question. Morawetz on Cor. secs. 877, 907.

The third ground of demurrer is that the action, if any, should be at law. The liability of the stockholders is not to the creditors, but for the indebtedness of the corporation, to an amount equal to the par value of their stock. In proportion to their stock, they must contribute to a common fund to be apportioned among the creditors entitled thereto, according to the relative amount of their debts proved. In the enforcement of this liability and the apportionment of the fund, there are equities among the creditors, among the stockholders, and between the creditors and stockholders, to be adjusted. A complete, convenient, and comprehensive remedy can be had only in a court of equity where the rights of all parties can be considered and relief requisite to meet the ends of justice granted in a single action. *Crown v. Brainard*, 57 Vt. 625; *Pollard v. Bailey*, 20 Wall. 520; *Terry v. Little*, 11 Otto 216; *German National Bank v. Farmers' and Merchants' Bank*, 74 N. W. Rep'r 1086.

Were it possible to determine the questions involved in a court of law, the interference of a court of equity would be justified upon the ground that a comprehensive decree covering the whole controversy can there be made and thus avoid a multiplicity of suits that would certainly arise. *Smyth v. Ames*, 169 U. S. 466; 1 Pom. Eq. Jur. secs. 268, 269.

But, as their fourth ground of demurrer, defendants contend that if a suit in equity can be maintained, it should be by the receiver appointed and in the discharge of his duties before the commencement of this action. With this contention we

quite agree. As before stated, the provisions for personal liability with the capital of the corporation was the basis of its credit. The creditors had a right to understand that, although the debts contracted were the debts of the corporation and that, in their enforcement, the remedy against it and its primary assets must first be exhausted, if such assets proved insufficient, they had, as security for the deficiency, this liability of the stockholders. The stockholders knew the law and voluntarily assumed that responsibility, and while it was not enforceable by the corporation, it is a secondary asset for that purpose and constitutes a trust fund to be resorted to by the receiver in the marshalling of assets, if necessary for the full satisfaction of the indebtedness for which it is holden. The receiver represents the corporation, the stockholders, and the creditors; and if the primary assets prove insufficient for the payment of the corporate indebtedness, it is his right and duty, under the direction of the court, to enforce this liability in the same proceeding for the benefit of those creditors entitled to the trust fund to be derived therefrom. *Post v. Toledo, etc., R. R. Co.* 144 Mass. 341 (59 Am. Rep. 86); *Cushing v. Perot*, 175 Pa. 66 (34 L. R. A. 737); *McKusick v. Seymour etc. Co.*, 50 N. W. Rep'r. (Minn.) 1114; *Farmer's Loan & Trust Co. v. Funk*, 68 N. W. Rep'r. (Neb.) 520; *Pickering v. Hastings*, 76 N. W. Rep'r. (Neb.) 587; *Wilson v. Book*, 43 Pac. Rep'r. 939; Thompson on Cor. sec. 3368.

Of the stockholders at the time of the insolvency of the corporation, some have since died, letters of administration were taken upon their estates, commissioners were appointed to receive, examine, and adjust the claims and demands against the estates and in offset thereto, the times for presenting claims have expired, and claims which, by law, should have been thus presented for allowance but were not, are barred. Sec. 2436, V. S. But it is said by the orators that the nature of the liability in question is such that commissioners have no jurisdiction over claims for its enforcement and, therefore, they are not barred by a failure thus to present them.

Notwithstanding the liability is contractual, the right of recovery and the extent thereof can be determined only in a court of equity. For the holding that such claims are purely of an equitable character, commissioners without jurisdiction, and the claims not barred by not presenting them, the case of *Spalding v. Estate of Warner*, 52 Vt. 29, is full authority. The rule is there laid down that "When resort to chancery is necessary, to ascertain and establish the right of recovery or the extent of that right, the claim is of a purely equitable character, and commissioners have no jurisdiction over it, and it is not barred if not presented to them for adjustment."

Creditors have a priority of right to satisfaction, and if the estates of such deceased stockholders have been received by heirs-at-law or legatees, the assets may be followed in equity, into whosoever hands they come. *Newman v. Barton*, 2 Vern. 205; *Noel v. Robinson*, 1 Vern. 90; 1 Story Eq. Jur. 92. And as such heirs and legatees have an interest in the assets thus sought to be refunded, they are necessary parties to the bill. Mitford's & Tyler's Pl. & Pr. in Eq. 36.

But it is urged that Farrington and Thayer as assignees of the insolvent estate of G. & F. E. Briggs, under appointment of the Court of Insolvency, were improperly made parties and that the assets of the insolvent estate can be distributed only in accordance with the insolvency laws, under the direction of the court of insolvency; that it having seized the assets for distribution to creditors, no other court could subsequently interfere therewith, and reference has been made to many authorities in support of this position.

Without expressing any opinion as to the general law applicable thereto, we think the provisions of the insolvency law, and the decisions of this court construing the same, are controlling. The liability of the partnership as stockholder, for the indebtedness of the Vermont Investment & Guarantee Company, could not be proved against the insolvent firm in the ordinary way of proving debts and claims in the insolvency court. The fact that

the partnership is in insolvency and that its assets must be distributed among its creditors according to the insolvency laws, renders it no less necessary that the right of recovery and the extent thereof against it as a stockholder, under the provision in question, should be established in a court of equity. The same equities are to be adjusted as would have to be, if the firm was not in insolvency. The amount due from it by reason of this liability is in dispute, and a suit, by leave of the court of insolvency, may be brought and proceed to judgment, during the pendency of the insolvency proceedings, for the purpose of ascertaining that amount; and when the amount is thus ascertained, it may be proved as a debt in the insolvency proceedings. Secs. 2071, 2074, V. S.; *Patterson v. Smith*, 66 Vt. 633; *Thomas v. Carter*, 63 Vt. 609. The claim will then stand like other debts and claims proved, and the distribution of the estate of the partnership and the separate estate of the surviving partner among the creditors will be governed by the provision of sec. 2164, V. S.

In *Thomas v. Carter* it was expressly held that the bringing of a suit was not prohibited, and that the protection to the debtor was by application to the court for a stay of the suit. When such application is made, it is within the province of the court to allow the suit to proceed to judgment to ascertain the amount due, if it is in dispute. The assignees were properly made parties.

F. E. Briggs, one of the members of the partnership, died after the filing of the petition against it in insolvency, and thereby the proceedings against his separate estate were discontinued, leaving it to be settled like other estates of deceased persons. Sec. 2170 V. S.; *Bartlett v. Walker*, 65 Vt. 594. And, although the claim under the charter provision, against the partnership, would be joint as to the members, it is provable against his estate the same as it would be, were the liability joint and several. Sec. 2440 V. S. With the claim thus proved, independent of other considerations, it would stand ratably with other debts against the estate. But, under the insolvency law (sec. 2164, V. S.), and also

in equity (*Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Bardwell v. Perry*, 19 Vt. 292), partnership effects must be applied in satisfaction of partnership debts and liabilities, in preference to debts due creditors of the individual partners. This gives the partnership creditors a prior lien upon the partnership assets and an equal lien upon the separate assets of the private estate, while the private creditors have an equal lien only upon the latter. Creditors who come into equity for the enforcement of their claim, must do equity. They must first exhaust the partnership effects, and for any balance remaining unpaid thereafter, they will stand on an equal footing with the private creditors of F. E. Brigg's estate. *Bardwell v. Perry, supra*; *Washburn v. Bank of Bellows Falls, supra*; 1 Story Eq. Jur. (9th Ed.) sec. 645a.

Defendants further contend that debenture holders are not unsecured creditors, and are misjoined.

It is not necessary to consider what the effect would be did it appear that they were secured. The name does not necessarily imply a secured debt or claim. A "debenture" is defined in the Century Dictionary as, "A writing acknowledging a debt; specifically, an instrument, generally under seal, for the repayment of money lent; usually if not exclusively used of obligations of corporations or large moneyed copartnerships, issued in a form convenient to be bought and sold as investments. Sometimes a specific fund or property is pledged by the debentures, in which case they are usually termed mortgage debentures."

It would seem from this definition, that to have a specific fund or property as security for the payment is an exception to the rule, rather than the rule itself. No misjoinder of parties in this regard is disclosed by the allegations in the bill.

Decree dismissing the bill affirmed with costs to the defendants in this court, and cause remanded.

STATE v. FRED AUSTIN.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed November 20, 1899.

Practice—The question of the sufficiency of an information for adultery, raised by demurrer, being needlessly before the Supreme Court through the omission of the State's Attorney to ask leave to amend, judgment was reversed *pro forma* and cause remanded.

INFORMATION for adultery. Windsor County, June Term, 1899, *Start*, J., presiding. The respondent demurred. Demurrer overruled, and information adjudged sufficient. Respondent excepted.

J. G. Sargent, State's Attorney, for the State. *W. W. Stickney* and *W. B. C. Stickney* with him on the brief.

R. M. Harvey and *M. M. Wilson* for the respondent.

PER CURIAM. The question is whether the allegation that the prisoner had carnal knowledge *with* Cora Smith, etc., charges adultery. The case is so needlessly here that we do not consider the question on its merits, but reverse *pro forma*, sustain the demurrer, and remand, that the State's Attorney may ask leave to amend the information, which he ought to have done at once on the objection being made. It is not well that the course of justice should be obstructed by impediments that can be so easily removed.

H. F. PATTON v. CARDINER BROTHERS.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON and WATSON, JJ.

Opinion filed November 20, 1899.

Sale—Mutual promises a consideration for each other—The defendants being indebted to the plaintiff, orally offered to sell him a monument for \$125, to apply on account. The plaintiff said, "I will take it." It not appearing that the plaintiff misunderstood the offer, the promises were mutual and a consideration for each other, and made a bargain and sale.

Sale—Passing of title as between parties—As a future application of the price was not contemplated, the contract applied it at once ; and as the monument was thereby paid for, and nothing remained to be done but for the plaintiff to take possession of it, the title passed as between the parties without delivery.

ASSUMPSIT. Plea, general issue. Trial by referee. Hearing on report, Washington county, March Term, 1899, *Thompson*, J., presiding. Judgment for the plaintiff. Defendants excepted.

The referee found the defendant indebted to the plaintiff in the sum of \$247.51. One of the items in dispute was a credit of \$125, which the defendants asked on account of a monument that they claimed to have sold to the plaintiff. The referee reported the facts in respect to this item, and disallowed it on the ground that on the facts there was as matter of law no sale of the monument. The facts in relation to this item, found by the referee, are stated in the opinion.

H. William Scott for the plaintiff.

John W. Gordon for the defendants.

ROWELL, J. The defendants offered to sell a monument to the plaintiff for \$125, to apply on account. The plaintiff said, "I will take it." There was no delivery, but the monument remained in the defendants' possession till it was attached in this

suit. The defendants considered it a sale and a payment of so much, but the plaintiff did not so consider it. But there was an offer and an unconditional acceptance, identical with the terms of the offer, made, for aught that appears, with the intention on both sides of creating or changing legal relations. Had it appeared that the plaintiff misunderstood the offer, the promises, being oral, would not have been mutual, and therefore would not have been a consideration for each other. Thus, if the plaintiff had accepted the offer thinking the price to be \$100, there would have been no sale, for then the defendants' promise would have been, "We will sell you this monument for \$125," but the plaintiff's would have been, "I will give you \$100." But as it does not appear that the plaintiff misunderstood the offer, nor thought it different from what it was, his acceptance must be construed to be an acceptance of it as it was in fact made, and therefore the promises were mutual, and a consideration for each other, and made a bargain and sale.

As a future application of the price was not contemplated, the contract was effective to apply it at once as part payment of the account, *Jewett v. Winship*, 42 Vt. 204; and as the monument was thereby paid for, and nothing remained to be done but for the plaintiff to take possession of it, the title passed as between the parties. *Fletcher v. Howard*, 2 Aik. 115; *Bemis v. Morrill*, 38 Vt. 153.

No question arises under the Statute of Frauds, as the testimony to prove the contract was received without objection.

Judgment reversed, and judgment for the plaintiff for the amount found his due, less said sum of \$125, applied as of the date of its payment.

STATE v. CHARLES F. RICHARDSON.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed November 20, 1899.

Marriage and divorce—V. S. 2703, 2704—When a marriage is dissolved by a divorce, the libellee who afterwards marries in New Hampshire and returns to and lives in this State with the wife whom he so marries, within three years from the date of the divorce, cannot be punished for living in this State under such marriage relation notwithstanding the provisions of V. S. 2703 and 2704.

State v. Shattuck, 69 Vt. 403 is decisive of this case. .

INFORMATION for a breach of the divorce law. Windsor County, June Term, 1899, *Start*, J., presiding. Respondent demurred. Demurrer overruled *pro forma*. Respondent excepted. Case passed to the Supreme Court before final judgment

The information was filed June 4, 1899, and set out that the respondent at Albany in this State was married to Alice Richardson in July, 1886; that at the May Term, 1898, of Windsor County Court, a divorce was granted to the said Alice Richardson from the respondent; that the said Alice was still living; that March 16, 1899, within three years after said divorce, the respondent was, in the State of New Hampshire, joined in marriage to one Hattie M. Royce of Norwich in this State; that immediately after said marriage and on the same day, the respondent returned into this State with the said Hattie M. and from that time to the filing of the information had lived in this State at Hartford in the County of Windsor with the said Hattie M. as his wife under the marriage relation so contracted with her in New Hampshire, contrary, etc.

W. W. Stickney and J. G. Sargent for the State.

James G. Harvey for the respondent.

TAFT, C. J. V. S. chap. 132 regulates the subject of "Marriage and Divorce." Section 2703 of that chapter provides that when a marriage is dissolved pursuant to that chapter, the libellee is forbidden to marry a person other than the libellant for three years from the time such divorce is granted, unless the libellant dies. Section 2704 enacts that a person who violates the preceding section or lives in this State under a marriage relation forbidden thereby, shall be imprisoned, etc. In *State v. Shattuck*, 69 Vt. 403, it was held that when a libellee in such a case, residing in this State, went into the State of New Hampshire, was there married and returned to this State, her marriage was lawful here. The respondent is complained of under sec. 2704 for living under a marriage relation forbidden by sec. 2703. The marriage was solemnized in New Hampshire and if the respondent, and Hattie M. Royce, the person to whom he was married in that State, are lawfully man and wife in this jurisdiction, as they are under the authority of *State v. Shattuck, supra*, it follows that they cannot be punished for living together in that relation in this State. *State v. Shattuck, supra*, is decisive of this case.

Judgment overruling the demurrer reversed. Demurrer sustained. Information adjudged insufficient and quashed, and the respondent discharged.

JESSE L. WOOD v. H. P. AGOSTINES.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON and WATSON, JJ.

Opinion filed November 20, 1899.

Plea of nul tiel record—The general issue in an action of debt on judgment is *nul tiel record* and not *nil debet*.

Proof under plea—A defect appearing upon the face of the record may be taken advantage of under a plea of *nul tiel record*, but if the record upon its face shows a valid judgment the plea of *nul tiel record* is not sustained unless there is a variance between the record offered in evidence, and the declaration.

Extrinsic evidence inadmissible under plea—Although the record of a judgment showing jurisdiction may be contradicted by extrinsic evidence, such evidence is not admissible under the plea of *nul tiel record*.

Evidence—Absence of testimony equally available to both parties, prejudicial to neither—It was correct to prohibit counsel for the plaintiff from arguing that the jury should draw an inference unfavorable to the defendant from his failure to call a certain person as a witness, when such person was equally within the reach of both parties, and for anything that appeared the plaintiff had as much knowledge as the defendant of what such person knew of the matter in controversy.

Argument confined to the evidence in the case—A statement of counsel that he claimed nothing for the evidence "if it was not put in" implied that he had evidence which he had not introduced, and was improper and a cause for reversal, though in this case the reversal is on other grounds.

DEBT ON A JUDGMENT of a Maine court. No pleadings were filed by the defendant. Washington County, March Term, 1899. Thompson, J., presiding. Trial by jury. Verdict and judgment for the defendant. The plaintiff excepted.

An authenticated copy of the record of the judgment sued on was introduced in evidence. It showed personal service on the defendant, August 18, 1891. Subject to the plaintiff's objection the defendant was permitted to introduce evidence tending to prove that at the time of the service of the writ in the suit in

which said judgment was obtained, he was not in the State of Maine, and that the writ was never served on him, and that he neither employed, nor authorized any person to employ, an attorney for him in said suit. The County Court held that this evidence was admissible under the general issue as tending to show that the alleged cause of action never existed.

The evidence of the defendant tended to show that he came from Maine to Montpelier, Vermont, about July 4, 1891, and that he had since resided continuously in Vermont, and had never since been in the State of Maine. His evidence tended to show that upon so coming to Montpelier he stopped for a time with Mr. and Mrs. John Milenia of that city.

The date at which the defendant arrived at the Milenias in Montpelier, was a material issue on the trial. The defendant claimed to be unable to state the date when he first went to the Milenias, and did not state such date. It appeared in evidence that John Milenia is dead. There was no evidence tending to show whether Mrs. Milenia, his wife, was living at the time of this trial or not; or to show where she was living if alive, other than such inference as the law would draw in respect thereto from the fact that she was living in Montpelier in 1891. She was not improved as a witness by either party. Counsel for the plaintiff was prohibited from arguing to the jury that the failure of the defendant to produce Mrs. Milenia as a witness was a fact from which they might draw an inference unfavorable to the defendant.

The defendant's evidence tended to show that when he was in Maine he was in partnership with one Archie; and his evidence tended to show that said Archie resembled him in respect to height and build. It was claimed by the defendant that the writ in the Maine suit was served upon said Archie instead of upon himself, and whether it was in fact so served became a material issue in the case. There was evidence tending to show that the defendant was about fifty-five years of age at the time the Maine suit was brought, but there was no evidence as to the

age of said Archie. In arguing the defendant's theory of the service in Maine to the jury his counsel referred to the resemblance between the defendant and Archie, and continuing said that Archie was about fifty-five years old at the time when the Maine suit was brought. Upon objection to this statement being made and an exception allowed the defendant, counsel, after reference had been had to the reporter's minutes said "I claim nothing for that if the evidence was not put in." The allowance of an exception to this remark also was asked for, whereupon defendant's counsel said to the jury, "If there was no evidence, gentlemen, as to the age of Mr. Archie I claim nothing for it, and ask you not to consider anything I have said as to Mr. Archie's age." An exception was allowed the plaintiff.

Richard A. Hoar for the plaintiff.

John W. Gordon for the defendant.

TAFT, C. J. This action is debt on judgment. No pleadings were filed by the defendant. Under No. 10, County Court rules, the general issue was considered as pleaded. The general issue in an action of debt on judgment is *nul tiel record*. In an action of debt on judgment, *nul tiel record* is the proper plea and not *nil debet*. The plea *nul tiel record* puts in issue, simply the existence of such a record as is declared upon and that question is determined by the court upon an inspection of the record itself; when matter of fact as well as matter of law is pleaded, the issue is to the jury. If a record upon its face shows a valid judgment, the plea of *nul tiel record* is not sustained unless there is a variance between the record offered in evidence and the declaration. *Stevens v. Fisher*, 30 Vt. 200; *Stevens v. Hewitt*, *ibid*, 262.

When this case was before us, reported in 70 Vt. 637, it was held that although the record showed that the court rendering judgment had jurisdiction, extrinsic evidence was admissible to show that it had not. The question of pleading was not raised but the case passed to this court on a *pro forma* ruling to determine if the record could be contradicted by showing want of

jurisdiction. The question now presented is whether under the plea of *nul tiel record*, the facts, that process in a suit in Maine in which the judgment sought to be recovered was rendered, was not served upon the defendant, and that he did not appear in the suit, neither by himself nor by attorney,—in effect that he had no notice of the suit,—can be shown. If the record of a judgment shows jurisdiction, extrinsic evidence is not admissible under a plea of *nul tiel record*. Pleading is to inform the court and the parties of the facts in issue; the court that it may declare the law, the plaintiff what facts to establish and the defendant what to meet by their respective proofs. A defense contradicting the record must be pleaded that the facts may be put in issue. A defect appearing upon the face of the record may be taken advantage of under a plea of *nul tiel record*, but those requiring extrinsic proof to make them apparent, must be alleged before proved. This is in accord with precedents and the elementary principles of good pleading.

2. Plaintiff's counsel was prohibited from arguing that the failure of the defendant to produce Mrs. Milenia as a witness in regard to the time he arrived in Montpelier, was a fact from which the jury might draw an unfavorable inference against the defendant. The record does not disclose that the plaintiff did not have as much knowledge on the subject of what Mrs. Milenia knew in regard to the matter as the defendant. If she had, the witness was equally within reach of both parties and the court was correct. *Arbuckle v. Templeton*, 65 Vt. 205; *State v. Fitzgerald*, 68 Vt. 125. We cannot presume the want of knowledge on the part of the plaintiff in order to reverse the judgment. For aught that is shown by the record the plaintiff had such knowledge, and the ruling therefore correct.

3. The statement of the counsel that he claimed nothing for the evidence "if it was not put in," contained an inference that he had such testimony, a fact which it was improper to state to the jury. While it may be true as argued by him, "if a case is to be reversed every time an attorney on either side mis-states

the evidence, few cases would ever stand," a few reversals will teach salutary lessons to the counsel and quicken their memory in respect to what has and what has not been shown. It is cause for reversal but it is immaterial what we hold on the question as the cause is reversed on other grounds.

Judgment reversed and cause remanded.

ALLAND G. FAY v. ORION M. BARBER.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed November 23, 1899.

Truancy—Costs—V. S. 2019—The costs of prosecutions and commitments for habitual truancy are payable from the state treasury under V. S. 2019.

Fees of justices in criminal cases—Under V. S. 5387 a justice is entitled in a criminal case to the special fees therein provided for warrant, record, subpoena, venire and each continuance, so far as such fees represent services necessarily performed by him, in addition to the general fee in the case provided by said section.

Intoxicating liquor—Fees of justices—A justice is entitled to no fee for complaint and search warrant in proceedings against intoxicating liquor if no liquor is found. That part of V. S. 5387 which provides a fee for "complaint and search warrant" is only a continuation of Acts of 1890, No. 50, sec. 2, and has no reference to complaints and warrants in proceedings against intoxicating liquor.

Intoxicating liquor—Officer's fees—An officer is not entitled to a fee for searching for intoxicating liquor on a warrant, or for the expense of assistance in making search, unless liquor is found. The warrant for the seizure of liquor is not served unless liquor is seized, and, independently of special enactments, the law does not allow a fee to an officer for attempting to make service of any process civil or criminal.

Same—V. S. 5366—V. S. 5366, allowing one dollar, and ten cents a mile for travel from the place of service to the place of return for making search

on a warrant certified by a state's attorney, refers to the warrant mentioned in V. S. 5371, and not to warrants for searching for intoxicating liquor.

Same—V. S. 4547—V. S. 4547, which allows one dollar to an officer for serving process for seizing intoxicating liquor, allows nothing for making search, or for the expense of assistance in searching.

Commencement of prosecution—Until there is an actual seizure of liquor on the warrant the prosecution is not commenced so as to entitle either magistrate or officer to any fees.

Acts of 1896, No. 86, imposed no new duties upon state's attorneys, grand jurors or justices.

PETITION FOR MANDAMUS brought to the Supreme Court at its October Term, 1899. Formal answer waived by the petitioner, and case submitted on a stipulation that the disallowances of fees under consideration were all made as matters of law and not otherwise, and that the petitioner should be considered as denying the relief asked for on the facts set forth in the bill.

The facts are stated in the opinion.

Allard G. Fay, petitioner, pro se.

Barber & Darling for the petitioner.

THOMPSON, J. The defendant is state auditor. The petitioner is a justice of the peace and acted as such in the cases hereinafter mentioned. He brings this proceeding to compel the petitioner as such auditor, to allow and draw an order on the treasurer of the State for certain costs alleged to have accrued in said cases. For the purposes of this trial, it is taken that the allegations of the petition are true, and that the fees constituting such costs were reasonable and correct, if authorized by law. In disposing of the questions presented by this case, the court does not in any way consider or pass upon the discretionary power of the state auditor to refuse to allow bills of costs which he believes to be unjust, unreasonable or fraudulent, although the same may have been taxed by a court.

The first bill of costs mentioned in the petition, accrued in the case of *State v. Fred Darling*, in which the respondent was

convicted of being an habitual truant and sentenced to be confined in the Vermont Industrial School for the term of four years. The costs in question in this case are \$7.32, costs of prosecution, and \$13.49, costs of commitment. The only punishment for habitual truancy is confinement in the Vermont Industrial School for not less than twenty-six weeks. V. S. 718. Justice and municipal courts are given concurrent jurisdiction with the County Courts in prosecutions for this offense. V. S. 721. Unless these costs are payable by the state, there is no provision by law for their payment from any treasury.

V. S. secs. 2016 and 2019 contain the general law relating to the payment of fines and costs. Section 2016 is as follows:

“Fines, forfeitures and penalties, imposed on a person for an offense, or for the breach of a penal law, with costs, unless the same are otherwise disposed of by law, shall, if the prosecution is commenced and tried before a justice, belong and be paid to the treasury of the town, or if the prosecution is upon complaint of a village police officer, to the treasurer of the village in which the offense is committed; but if the prosecution is commenced and tried before the County or Supreme Court, the same shall belong and be paid to the treasury of the state, provided that in all cases appealed and entered in County Court, the fines and costs when imposed, shall be payable to the State, and the State shall pay the justice bill of costs.”

Section 2019 is as follows:

“The costs of prosecution for the breach of a penal law or other offense shall be paid out of the treasury to which the penalty by law belongs; but if the respondent is committed to the House of Correction they shall be paid out of the state treasury.”

The words “for the breach of a penal law or other offense” in section 2019, clearly include habitual truancy. It is quite clear that the legislature did not intend to provide for prosecutions for this offense before a justice of the peace, but at the same time to provide that no costs should be paid in such prosecution from any treasury, unless the punishment imposed was a fine.

There is no construction of section 2019 which will impose the payment of these costs upon the City of Barre. It is apparent that the intention in enacting this section was to cast the burden of paying the costs of the prosecution upon the state, if the punishment imposed accrued to its benefit or use by reason of its having the custody of the respondent and such service as he might render, if the punishment was by confinement in any of its institutions maintained for the detention of offenders against the criminal laws. The word "*penalty*" as used in this section includes such punishment, as well as fines and forfeitures. Habitual truancy is a criminal offense, the only penalty for which, as we have seen, is confinement in the Vermont Industrial School. Under this section, as we construe it, the state must pay the costs of prosecution and commitment in prosecutions for this offense.

In the case of *State v. Nicholas*, the question presented is whether the justice is entitled to the following items of costs: thirty-four cents for the warrant, twenty-five cents for record, twenty-four cents for subpoena for four witnesses, and seventeen cents for a continuance of the cause. In the case of *State v. Abbott*, the question is whether the justice is entitled to twenty cents for the venire summoning a jury in said cause.

By Acts 1882, No. 103, sec. 3, it was enacted as follows:

"There shall be paid to justices in criminal cases in lieu of fees heretofore paid in cases disposed of without trial, one dollar and fifty cents; a trial by court two dollars; a trial by jury two dollars and fifty cents; for making and returning copy of record in cases where the respondent is bound up, one dollar; for taking and returning an inquest on the dead or on the burning of buildings, three dollars."

By this section it was expressly provided that the fees therein given should be in lieu of fees theretofore paid in such cases and such was the unquestioned law from 1882 to 1894.

Said section 3 was amended by Acts 1894, No. 153, sec. 1, so as to read as follows: "There shall be paid to justices in criminal causes, one dollar and fifty cents, if disposed of without trial;

if by trial, two dollars; if by trial by jury, two dollars and fifty cents; and if the trial (by court or jury) requires continuous attendance to the exclusion of other cases before the same court for more than one day, two dollars additional for each subsequent day of such actual attendance." This section as amended is now incorporated into V. S. 5387. The petitioner contends that the omission of the words, "in lieu of fees heretofore paid," in the section as amended and in V. S. 5387, shows that the legislature intended that the sums named in section 3 as amended should be received by the justice as compensation for his time spent in disposing of a criminal case by trial or otherwise, and in addition to services necessarily performed by him, represented by the items in question. The defendant contends that section 5387 is to be construed in respect to criminal causes as if the words "in lieu of fees heretofore paid," were retained in it. Acts 1894, No. 153, being an enactment independent of the revision of the laws made at the same session of the legislature, and now embodied in V. S., it cannot be said that these words were omitted by the revisers to condense the language of the statute, but under the apprehension that its meaning was not thereby changed. V. S. 5387 so far as it embodies Acts 1894, No. 153, sec 1, must be construed as a continuation thereof. V. S. 5460. Among other fees to justices enumerated in V. S. 5387 omitted from Acts 1882, No. 183, sec. 3 by the amendment thereof by Acts 1894, are the following: "If the respondent is bound up, one dollar for making and returning copy of record; for taking and returning inquests on the dead, or buildings burned three dollars for the first day and two dollars for each day thereafter actually spent in the hearing of the evidence." Acts 1898, No. 134. Among other fees enumerated in this section, relating solely to criminal causes are the following: "For each warrant for criminals, thirty-four cents;" "for each mittimus thirty-four cents." These provisions of this section are inoperative, if it is construed so as to limit the fees of justices in criminal causes to the fees mentioned in sec. 1, No. 153, Acts 1894. But it is to be construed so as to give effect to all its provisions,

if it can be done without putting a forced or unusual meaning upon its plain language. The construction for which the petitioner contends gives effect to this section as a whole, without doing violence to the natural and plain import of its words, and this construction must prevail. Hence the petitioner is entitled to said items of fees.

The next question arises in the case of *State v. Pirolini*, in which a complaint was exhibited and a warrant was issued for the search of certain premises for intoxicating liquor believed to be kept in violation of law. Search was made by the officers under the warrant, and no liquor was found and no seizure nor arrest was made under the warrant. The petitioner asks to be allowed for himself, \$1.00 "for complaint and search warrant," and for the officer \$4.10 made up of the following items: "search and seizure, \$1.00; assistance, \$3.00; one mile travel, ten cents." It is claimed among other things, that these fees should be allowed, because, as it is said, Acts 1896, No. 86, imposes new duties upon state's attorneys and grand jurors in respect to making complaints for the search for intoxicating liquor unlawfully kept, and upon justices in respect to issuing a warrant in such cases. This statute imposes no new duties upon any of the officials named. It is the duty of state's attorneys and grand jurors, without complaint being made to them, to investigate all criminal offenses which they have reason to believe have been committed, and to prosecute the same, if such belief is found to be well grounded, whether they relate to violations of the law respecting the traffic in intoxicating liquor or any other criminal law of the state. This statute was simply declaratory of the then existing duty of the public officials therein named, and consequently does not aid in the determination of the question under consideration.

Unless the petitioner is entitled to one dollar for the complaint and search warrant by virtue of V. S. 5387, which says justices shall be allowed one dollar for complaint and search warrant, he does not contend that there is any law entitling him to such allowance. An examination shows that this provision of

sec. 5387 is only a continuation of Acts 1890, No. 50, sec. 2, and relates solely to a complaint and search warrant issued under V. S. secs. 1954 and 1956 for the search of a dwelling house in the day time or the night time, for property stolen, embezzled, or obtained by false tokens, for counterfeit coin, and other things therein named, but none of which include intoxicating liquor kept in violation of law. V. S. 1957 provides that the fees for warrant and search under V. S. secs. 1954, 1955 and 1956, shall be paid by the state when the state's attorney of the county or the town grand juror of the town in which such search is to be made, certifies in writing on the warrant that the search ought to be made. It is clear that the petitioner is not entitled to be allowed this item of one dollar.

Another question arises: was there such a prosecution in the Pirolini case that either the justice or the officer were entitled to any fees? It has been the uniform construction of the law, and the practice, that in a civil case an officer is not entitled to any fees for serving civil process unless he attaches property or makes service upon the defendant, no matter how much time he may spend in attempting to make service by attachment or summons. Nor has the law, independent of special enactments, been construed to allow an officer fees for serving a criminal warrant, unless he actually apprehends the respondent, no matter how much time the officer may have spent nor how much trouble and expense he may have incurred. V. S. 5371 provides under what circumstances an officer may receive fees for his travel in an unsuccessful search for a respondent charged with a crime punishable by imprisonment in the state prison. The enactment of this section shows that the legislature did not intend that fees should be paid to officers for an unsuccessful attempt on their part to serve a criminal warrant by arresting the respondent therein named, or by seizing the thing therein commanded to be seized. V. S. secs. 4547 and 5366 are the only authority for the allowance of fees to officers. Section 5366 allows one dollar, and ten cents a mile for travel from the place of service to the place

of return, for *making search* on a warrant certified by the state's attorney. This clearly refers to the warrant mentioned in V. S. secs. 5371 and 1957, and not to warrants for searching for intoxicating liquor. Section 4547 is as follows: "In addition to the fees now allowed by law, thirty-four cents shall be allowed to the justice for making a bond required by this chapter, thirty-four cents for an order for the forfeiture or destruction of liquor, fifty cents for attending such destruction; to an officer serving process for seizing intoxicating liquor, or seizing the same without process and apprehending the keeper, one dollar; for removing such liquor and keeping the same, his actual expenses; for destroying liquor under the order of court, and making his return of each order, one dollar; for posting the notices required if the owner or keeper is unknown, one dollar; and to a prosecuting officer, in case of conviction before a justice, except when the complaint is for intoxication and the respondent pleads guilty, five dollars; and the same shall be taxed and allowed in the bill of cost against the respondent." It will be observed that this section does not allow fees for making search, or the expenses for assistance to search, for intoxicating liquor, but only for serving the warrant for seizing it, or seizing the same without process and apprehending the keeper thereof, and for the officer's actual expenses for removing such liquor and keeping the same. A warrant for seizing liquor can only be served by actually seizing such liquor by the officer. Of course it cannot be removed and kept, until it has actually been seized on the warrant. This is all there is in sections 4547 and 5366, that can be said to bear on the question in issue. The law standing thus, it is clear that it was not intended that an officer should be allowed fees when neither liquor was found and seized, nor the keeper thereof apprehended on the warrant. Until there is an actual seizure of liquor on the warrant, the prosecution is not commenced so as to entitle either the justice issuing such warrant, or the officer attempting to serve it, to any fees. Therefore the petitioner cannot prevail as to any fees in the Pirolini case.

It is ordered that a writ of mandamus issue commanding the petitionee as State Auditor to allow the items of costs in the case of State v. Fred Darling, in the case of State v. Lucas Nicholas and in the case of State v. Daniel Abbott as set forth in said petition and not allowed, and to draw an order therefor on the treasurer of the State for the payment of the same to the petitioner as justice of the peace.

It is further adjudged that neither the petitioner nor the petitionee recover costs.

BLAISDELL AND BARRON, ADMINISTRATORS, v. SCHOOL DISTRICT
No. 2 IN WESTMORE.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed December 1, 1899.

Construction of record—Extrinsic fact—A finding that a school district meeting was held March 30, 1880, is sustained by the facts that the meeting was warned for the last Tuesday in March, that the record of the meeting showed that the voters met agreeably to the warning, and that the last Tuesday in March of that year was the 30th, notwithstanding the fact that the record of the proceedings is under date of March 29, 1880.

Negotiability of school district order—An order, negotiable in form, drawn on the treasurer of a school district by the prudential committee thereof, is negotiable in law.

No. 20, Acts of 1892, relating to public instruction, which provided that outstanding debts for repairs on school houses should be paid by the towns, fixed the liability as between the towns and the school districts, but did not discharge nor attempt to discharge, the districts from liability to their creditors.

School district order—Demand—Statute of limitations—No cause of action as to the principal of a school district order accrues till demand of payment, and when demand of payment on such an order, dated more than six

years before the commencement of suit, was not made until within six years of such commencement, the action is not barred.

Exceptions—Questions raised below must be shown—A question not shown to have been made below will not be considered, and if a transcript of the entire case is referred to for exceptions, any exception relied on should be pointed out to the court.

Exceptions—Reference to the entire case—The practice of referring to a transcript of the whole case is objectionable in the extreme.

SPECIAL ASSUMPSIT on a school district order. Pleas, the general issue, with notice of special matter, and the Statute of Limitations. Trial by court. Orleans county, March Term, 1899, *Start, J.*, presiding. Judgment for the plaintiffs for the amount found due upon the order. Defendant excepted.

The order sued on read as follows :

“ WESTMORE, VT., Feb. 21, 1881.

To the treasurer of school district No. 2, in the town of Westmore. Pay to Calvin Gibson or bearer the sum of four hundred and sixteen dollars and fifty cents and interest annually on said sum out of any money in the treasury not otherwise appropriated, it being the amount due him for money furnished to pay the liabilities of said district.

A. A. BROWN,
Prudential Committee.”

This order was executed and delivered to said Calvin Gibson, on or about the date which it bears. At the time suit was brought the plaintiffs were the holders of the order, as the personal representatives of one B. M. R. Nelson, to whom the order was transferred shortly after it was given. The writ was dated January 19, 1898.

W. W. Miles and Young & Young for the plaintiffs.

Bates, May & Simonds for the defendant.

ROWELL, J. Question is made as to the legality of the election of Brown, who drew the order in suit as prudential committee. The warning for the annual meeting of 1880 was

dated the 23d of March, and called the meeting for the last Tuesday of March, which was the 30th. The record of the votes and proceedings of the meeting is under date of March 29th, but states that the voters met agreeably to the warning. The court found that the meeting was duly warned and held, and that Brown was elected prudential committee thereat, and acted, and was recognized and treated by the district, as such during the year. As the finding as to the warning and holding of the meeting is supported by the record, taken with the extrinsic fact that the last Tuesday of March was the 30th day, it must stand, and makes the legality of Brown's election unquestionable, as the meeting was warned the requisite time.

The order was drawn on the treasurer of the district in favor of Gibson or bearer, and is therefore negotiable in form. But the defendant claims that it is not negotiable in law, and that therefore the plaintiffs cannot recover thereon, although the testator was the owner and holder thereof; and *Hyde and Foster v. The County of Franklin*, 27 Vt. 185, is relied upon in support of the claim, in which it was held that an order drawn by the judges of the County Court on the county treasurer, was not negotiable in law though negotiable in form. The case was put upon the construction of the statute, which was held to authorize the judges only to liquidate the amount of the expenditure and to give an order or a certificate that the holder was entitled to recover that amount from the county treasurer, and that then their authority ended. But the court had before that in *Dalrymple v. Whitingham*, 26 Vt. 345, given a different construction to the statute authorizing selectmen to draw orders on the town treasurer, and held that such orders when negotiable in form are negotiable in law, and that the transferee thereof can recover thereon in his own name. And in *Davenport v. Johnson*, 49 Vt. 403, it is said that the negotiability of such orders arises from the form of the instrument, and does not depend upon demand of payment.

The statute authorizing the prudential committee of a school district to draw orders on the district treasurer, is like the statute authorizing the selectmen of a town to draw orders on the town treasurer, and there is no reason why it should not receive the same construction, and consequently none why a school-district order should not be as negotiable as a town order, and we hold that it is.

It is claimed that the order in suit evidences a debt that accrued for repairs on the school house, and so is for the town to pay, under the act of 1892 relating to public instruction, and that therefore the district is not liable. But if it is for the town to pay, and if the town is liable directly to the plaintiffs, it does not follow that the district is not also liable to them. The statute does not undertake a substitution of debtors by compelling creditors to look to the town instead of the district. The existence of school districts is continued by the act for the settlement of their pecuniary affairs, and they are as liable to their creditors now as ever. The statute provides that outstanding debts for repairs on schoolhouses shall be paid by the towns. This fixes liability as between the towns and the districts for that class of debts; but it does not attempt to discharge the districts from liability to their creditors, and therefore it is unnecessary to inquire whether it could do that.

It is immaterial whether the twenty-five-dollar payment of February 14, 1894, was effective to remove the bar of the Statute of Limitations, for no cause of action accrued as to the principal of the order till demand of payment, and it is found that no such demand was made prior to 1893, which was within six years of the commencement of the suit. The statute provides that the duties of school district treasurers shall be like those of town treasurers, and that town treasurers shall pay orders drawn on them by the selectmen and overseers of the poor, and that if they do not pay them on demand, the holder thereof may recover the amount of the town. It has been held that the office of this latter statute is, to regulate the right of action on the orders, and

that it makes demand of payment a condition precedent to the right of recovery against the town. The duty of district treasurers being the same as the duty of town treasurers, namely, to pay on demand, the same rule applies to district orders as to town orders. And besides, by the general law, actions will not lie on municipal orders till they have been presented to the proper officer for payment. *Varner v. Nobleborough*, 2 Greenl. 121, 11 Am. Dec. 48; *City of Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244; 15 Am. & Eng. Ency. Law. 1211; 14 Ency. Pl. & Pr. 260.

It is objected that the prudential committee had no authority as such to issue this order, as it was given to take up another order that the payee held. Neither the exceptions nor the facts found, to which the exceptions refer to show the mooted questions and the claims of the parties, show that this question was made below. The exceptions refer to the reporter's transcript of the entire case, to show the tendency of the evidence, the claims and objections of counsel, the rulings of the court, and the exceptions thereto. No exception of this kind has been pointed out in the transcript, which is voluminous, gives no clew to exceptions, and has not been searched. The practice of referring to a transcript of the whole case for exceptions is objectionable in the extreme, and should be discontinued. The bill of exceptions should show on its face what the exceptions are.

Judgment affirmed.

TOWN OF MOUNT HOLLY v. TOWN OF PERU.

October Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Opinion filed December 4, 1899.

Pauper law—Residence of married woman—The town in which a husband has acquired a three years' residence is chargeable with the support of his wife, who comes to want while she is living apart from him in another town, notwithstanding the mere fact of the separation of husband and wife. The husband's residence determines that of the wife.

Notice under V. S. 3172—Notice in such case under V. S. 3172, which designates the person to whom assistance is furnished simply as M. L., without describing her as the wife of A. L., her husband, is sufficient.

Notice under V. S. 3172—Notice that the assisted person is poor and in need of assistance, is a sufficient notice of the condition of such person. The cause of such condition, in this case sickness, is immaterial.

Contemporaneous intention as to residence—Inadequacy of charge—In this case the determination of the residence of the husband required the application of the doctrine of contemporaneous intention, and the charge upon this point being deemed inadequate, judgment was reversed.

ASSUMPSIT to recover money expended in the support of a pauper. Plea, general issue. Trial by jury, Rutland County, March Term, 1899, *Watson*, J., presiding. Verdict for plaintiff. Judgment on verdict. Defendant excepted.

The evidence of the plaintiff tended to show that in June, 1897, one Mary Lyons became sick and in need of assistance while living in the Town of Mount Holly, that she applied to the overseer of said town for assistance, and that necessary assistance was furnished her; and that she was the wife of one Aaron Lyons, then living in, and partly supported by, the Town of Peru.

During the examination of the first witness on the part of the plaintiff, the plaintiff introduced in evidence the notice sent by the overseer of the poor of the plaintiff town, to the overseer of the poor of the defendant town, which was as follows:

“MOUNT HOLLY, VT., July 12, 1897.

To the Overseer of the Poor of the Town of Peru:

DEAR SIR:—You are hereby notified that Mary Lyons, now in the Town of Mount Holly, is a poor person, unable to support herself by her own labor and has no means of support and is being now cared for and supported by said Mount Holly, and that said Town of Mount Holly will look to the said Town of Peru to re-imburse it for all moneys expended in the care and support of the said Mary Lyons.

Yours truly,

A. W. Cook,

Overseer of the Poor of Mount Holly.”

The defendant objected to this notice because the evidence then in the case tended to show that the assistance furnished for which this action was prosecuted, was to the wife of Aaron Lyons, while the notice contained no reference to Aaron Lyons or his family, and only referred to Mary Lyons as an individual; also because it did not contain a notice of the condition of the person assisted other than that she was a poor person without means, the defendant claiming that it should have shown cause as to her need of support.

All the evidence tended to show that said Mary Lyons had not been a member of her husband's family since 1889, that she had never lived in the Town of Peru, and that for some time before she came to want as before stated she had kept house apart from her husband in the plaintiff Town of Mount Holly. At the close of the evidence the defendant made a motion for a verdict in its favor on the grounds so disclosed by the evidence. This motion was overruled.

Whether Aaron Lyons, the husband of said Mary Lyons, had resided in the defendant town for three years, supporting himself and family, was a question upon which the evidence was conflicting and the determination of which depended largely upon the question of contemporaneous intention.

The charge in reference to this matter was excepted to by the defendant. The substance of the charge upon this point and the evidence to which it was applicable appear from the opinion.

Butler & Moloney for the plaintiff.

A. E. Cudworth and *Joel C. Baker* for the defendant.

MUNSON J. The notice was sufficient and properly admitted. It was not necessary to describe the person assisted as the wife of Aaron Lyons. Her designation as Mary Lyons sufficiently answered the purpose of the notice. A town furnishing assistance can put itself in a position to recover without indicating the precise grounds of its claim. It is for the town receiving the notice to inquire as to any matters that may relieve it from liability. Nor was it necessary to mention Mrs. Lyon's sickness in giving notice of her condition. The requirement relates to the condition which is the basis of recovery, and not to the circumstances producing that condition. If a person is poor and in need of assistance, the cause of this condition is immaterial.

The defendant's motion for a verdict on the ground of separation and non-residence was properly overruled. The pauper law, notwithstanding its radical modifications, still recognizes the family as the basis of support and relief, and consequently of recovery. The husband is the head of the family, and his action determines the residence of its members. It is the duty of the wife to remain in the family until she has what the law considers a justification for leaving. The mere fact of separation cannot relieve husband and wife from the obligations which the law attaches to the marriage relation, nor towns from the obligations placed upon them because of this relation. The law still regards them as one family, and charges the support of both upon the town where the husband has acquired a three years' residence. The reasoning in *Tunbridge v. Norwich*, 17 Vt. 493, is somewhat applicable, notwithstanding the change in the law.

The exceptions to the charge must be sustained. Aaron Lyons came into Peru from the Town of Weston, where he had been staying some months ; and during the first part of the three years necessary to give him a residence in Peru he spent his Sundays in Weston and had his washing done there. The retention of this connection with Weston after he commenced work in Peru made it necessary to inquire regarding his contemporaneous intention as between these places. But in charging the jury the court proceeded upon the assumption that a three years' residence in Peru began when he commenced work there, and confined its application of the doctrine of intention to the effect of a subsequent three weeks' absence from Peru. Upon its attention being called to this oversight by an exception, the court charged further that it was necessary to find in the first place that Lyons had a home in Peru within the meaning of a home or residence as before given. But in that part of the charge to which the jury would naturally consider itself referred by this instruction, there was no mention of the doctrine of intention. This final instruction was excepted to as inadequate, and the exceptions upon this point are sustained.

Judgment reversed and cause remanded.

E. W. HYSER v. W. H. MANSFIELD ET AL.

October Term, 1899.

Present : TAFT, C. J., ROWELL, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed December 4, 1899.

Head of family—An unmarried man without children may be the head of a family and a housekeeper.

Homestead—The orator, an unmarried man, having bought, improved and kept, a piece of land, with a building thereon, with the intention of making a dwelling for himself and mother, such preparations and intention made it a homestead.

Execution sale of homestead enjoined—A threatened sale on execution of a homestead will be enjoined. A completed levy would be a cloud upon the title, and equity will prevent as well as remove a cloud.

BILL IN CHANCERY to enjoin the defendants from selling on execution real estate of the orator claimed by him as a homestead. Heard on pleadings and the report of a special master, Orange County, December Term, 1898, *Tyler*, Chancellor. Decree in accordance with the prayer of the bill. The defendants appealed.

The defendants Mansfield and Sherwin recovered separate judgments against the orator, upon which executions were issued which they put into the hands of the defendant Parish as deputy sheriff. Parish served the same upon the claimed homestead, and gave notice of a day fixed upon which he would sell the same at public auction to satisfy said executions. Thereupon this bill was brought and a temporary injunction granted.

J. D. Denison for the orator.

B. A. Hunt for defendants.

MUNSON, J. The orator, an unmarried man without children, living with his mother in hired rooms and contributing to the expense, bought a piece of land upon which there was an old shop, and from time to time, as his other work permitted, made the changes necessary to convert the shop into a dwelling. Before these repairs were completed the defendants attached the property; and after this attachment the orator and his mother moved into the building, where they have since kept house. The master finds that the orator bought and improved and kept the property with the intention of making a dwelling for himself and his mother; and that at and ever after the time of the attachment he was the housekeeper or head of the family, if an unmarried man without children can be such in law.

The orator could acquire a homestead, for an unmarried man without children can be the head of a family and a housekeeper. *Pierce v. Cusic*, 56 Vt. 418. The orator's intention and prepara-

tions regarding the property which the defendants propose to sell were sufficient to make it a homestead. *West River Bank v. Gale*, 42 Vt. 27; *Rice v. Rudd*, 57 Vt. 6; *Woodbury v. Warren*, 67 Vt. 251. The orator is entitled to have the threatened sale enjoined. A completed levy would be a cloud upon his title; for the invalidity of the levy would not appear from an inspection of the record, and could be established only by proof of extrinsic facts. 3 Pom. Eq. Jur. sec. 1399; 6 A. & E. Ency. Law, 2d. Ed. 149. He has no remedy at law, for his possession of the property precludes the bringing of ejectment. 6 A. & E. Ency. Law, 2d. Ed. 159. He has not proceeded prematurely, for equity will prevent as well as remove a cloud. 6 A. & E. Ency. Law, 2d. Ed. 159; 3 Pom. Eq. Jur. sec. 1398, note.

Decree affirmed and cause remanded.

STATE v. BURLEIGH E. TOTTEN.

May Term, 1899.

Present; ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed December 4, 1899.

Statement—The evidence of the State tended to show that the respondent feloniously took money, including two five dollar bills from the person of one Guyette. The respondent claimed that the money was snatched from said Guyette by one F.

Evidence—Similar but unconnected fact—Evidence on the part of the respondent that on the evening of the robbery, shortly after its commission, F attempted to steal from the person of the respondent was inadmissible.

Evidence—Facts inter-dependent for probative effect—Neither the want of money by F before the robbery and during the same evening, nor his possession of money, including a five dollar bill, after the robbery during the same evening, standing by itself was material. The probative effect of these facts results from a combination of the two.

Evidence—Self-criminating declarations of third person—The respondent made an offer to show these two facts, but this offer was vitiated by the fact that the offer was to show the first by the declarations of F. The declarations of a third person tending to show that he committed the crime with which the respondent is charged are inadmissible.

Evidence—Declarations as characterizing possession—A declaration of F, a third person, in displaying money after the robbery, to the effect that he had taken it from a certain person, was not admissible in evidence. This declaration did not characterize the possession of the money, otherwise than by stating the source from which it was acquired, and was merely a recital of a past transaction.

Evidence of good character—Charge—In charging upon the subject of good character it was proper to refer to the fact that those who had testified upon that point had known the respondent but a short time. The treatment of the matter of good character was sufficient.

Fictitious defence evidence of guilt—If the respondent's testimony to the effect that the robbery was committed by F, a third person, was an invention, it was a circumstance tending to establish guilt.

Reasonable doubt—Charge—The charge upon the subject of reasonable doubt as applied to the nature of the defence was held sufficiently definite.

Charge as a whole—The doctrine is recognized that, without erroneous statement of legal principle, there may be such a failure to present adequately the claim of a party as will require a reversal, but upon a review of the exceptions no error in this respect is found in the charge in this case.

INFORMATION charging the respondent with robbery, being unarmed. Trial by jury, Chittenden County, March Term, 1899, *Taft*, C. J., presiding. Verdict and judgment of guilty. Respondent excepted.

Upon the subject of good character the court, after referring to the time to which the evidence upon this point was confined, charged as follows :

“ One's good character is a fact that is always proper to be put in evidence, when you are considering the question of whether a man is guilty or not guilty of any offense that he is charged with.

“ If you are satisfied upon the evidence that he is guilty of any crime that is charged, the fact that he has always borne a good character is no defense, but it is proper for a person to put

it in evidence, and in issue, the good character that he has always maintained, for you to consider, in connection with all the rest of the evidence, whether he committed the crime or did not commit the crime."

R. E. Brown, State's Attorney, for the State.

E. C. Mower, assigned, and *J. E. Cushman* for the respondent.

MUNSON, J. The evidence of the State tended to show that the respondent knocked down one Guyette on the street late in the evening, and took from his person a pocket-book containing two five dollar bills and a one dollar bill. The respondent claimed and testified that Guyette's pocket-book was snatched from his hand by one Finneran, who came up while the respondent and Guyette were together on the street. In support of this defense the respondent offered to show that on the night of the robbery and after its commission, while he and Finneran were together at the house of one Ploof, Finneran attempted to steal from the respondent's pocket. This was properly excluded. There was no legitimate evidentiary connection between the subsequent act and the one which the respondent sought to establish. The subsequent act could have no effect in fastening the robbery upon Finneran except as showing that he was morally capable of it. Proof of this nature is inadmissible. *State v. Kelley*, 65 Vt. 531.

The respondent offered to show that on the evening in question and prior to the robbery Finneran tried to borrow ten cents to get shaved with and, in a separate offer, at what stage of the evidence and by what witness does not appear, that on the same evening and subsequent to the robbery he had a considerable sum of money, including a five dollar bill. It is probable that an offer embracing both these matters would have been admissible. But neither the want of money before the robbery, nor the possession of it afterwards, standing alone, was material. The probative effect results from a combination of the two. The rule requires that when two facts are dependent upon each other for their

effect, the two shall be offered together or one offered with notice of the other. The reason and necessity of this rule are apparent. If this second offer did not immediately follow the first, and especially if it was to show by a different witness, the final ruling might easily have been made without an apprehension of the full purpose of the examiner. The court is not required to be constantly on the watch to see whether some previous ruling should be recalled, and a different course taken, because of some subsequent offer. If these two offers had been combined, the purpose of the inquiries and the ground of admissibility would have been brought to the attention of the court.

So the correctness of the second ruling is to be determined by what was contained in the offer then presented, and it is true that this was an offer to show that Finneran had no money before the robbery and that he did have after it. But in this offer, the fact that Finneran had no money before the robbery was to be shown by his declarations that he had none. This vitiated the entire offer. The declarations of a third person, tending to show that he committed the crime for which the respondent is being tried, are not admissible. 1 Best Ev.*118; *State v. Marsh*, 70 Vt. 288.

The respondent also offered to show that in displaying money after the robbery, Finneran said that he had "touched" a man on the street for it, and that he had taken it from a "certain person." This offer was inadmissible for the reasons before stated. But if the fact of Finneran's having money after the robbery had been made admissible by a proper offer, the declarations offered would not have been admissible. The respondent claims that inasmuch as they accompanied the production of the money they were admissible as a part of the *res gestae*. It is argued that the production of the money was inseparable from its possession, and that statements characterizing possession are always admissible. But these declarations did not characterize the possession otherwise than by stating its origin, and in giving the origin of the possession they were merely the recitals of a past

transaction. The doctrine relied upon is given a broad application in connection with the possession of both real and personal property, but while declarations are received showing the nature of the right claimed, statements as to the manner in which that right was acquired are excluded. 95 Am. Dec. 70, note; *Thompson v. Marwhinney*, 17 Ala. 362.

The exception to the failure to charge further upon the subject of good character is not sustained. The treatment of the matter was not of the nature considered objectionable in *State v. Daley*, 53 Vt. 442. It was proper to refer to the fact that those who testified to the respondent's character had known him but a short time.

The court charged in substance that, upon all the evidence in the case, the jury must be satisfied beyond a reasonable doubt of the respondent's guilt. There was no special application of this doctrine to the nature of the defense. The respondent excepted to the omission to charge that it was not necessary to the respondent's defense that the jury be convinced that Finneran committed the crime, and that their failure to believe his evidence regarding Finneran would bear only upon his credit as a witness generally, and that it would be sufficient if that evidence raised a reasonable doubt in their minds as to the respondent's guilt. The court then charged further that it was not necessary that they should find the respondent's evidence regarding Finneran true beyond a reasonable doubt, but that they should consider it in connection with the rest of the testimony upon the general question as to his guilt. No exception was taken to this supplemental charge. Some members of the court think the respondent was entitled to a more definite instruction as to the bearing of his testimony under the doctrine of reasonable doubt, but a majority of the court are satisfied that the jury cannot have failed to understand the application of the general rule, as previously announced, to a defense of this character. It was said in the opinion in *State v. Gorham*, 67 Vt. 365, that a jury must

know without instruction that the more the testimony shows against another the less it shows against the respondent.

There was certainly no error in failing to charge that a finding that the Finneran story was an invention would bear only upon the respondent's credibility as a witness. If the story was an invention, its introduction was a circumstance tending to establish his guilt.

The respondent took other exceptions to the charge and to omissions to charge, upon which it is argued generally that the court presented the evidence and claims of the State so fully, and ignored those of the respondent to such an extent, that it in effect withdrew substantial portions of the respondent's case from the consideration of the jury. This court recognizes the doctrine that, without erroneous statement of legal principle, there may be such a failure to adequately present the claim of a party as will require a reversal. Some members of the court are inclined to think there was such a failure in this case, but a majority of the court, upon a careful review of the exceptions and after a full comparison of views, are satisfied that there was no error in this respect.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions.

JUSTUS R. HOADLEY, ADMINISTRATOR, v. THE INTERNATIONAL
PAPER CO.

October Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Opinion filed December 4, 1899.

Contributory negligence—Proximate cause—Sunday Law—When the ground of action is the negligence of the defendant in respect to a person injured, it is no defence that such person was working on Sunday when the cause of action arose. That the person injured was so working is neither in law nor in fact contributory negligence concurring to produce the injury, nor the proximate cause of it.

Johnson v. Irasburg, 47 Vt. 32, *Holcomb v. Danby*, 51 Vt. 435, and *Duran v. Insurance Co.*, 63 Vt. 440, distinguished.

Charge more favorable than the law—A charge which left it to the jury to say whether working on Sunday was a proximate cause of an injury, was more favorable to the defendant than he was entitled to, and his exception thereto cannot be sustained.

Negligence of fellow servant—The decedent was killed while working for one Spring, a contractor and builder, in making certain repairs on the defendant's digester; and since, so far as the case shows, he was neither employed, paid, directed nor governed by the defendant, the fellow-servant doctrine is not involved by the fact that the decedent was killed through the neglect of one who was an employee of the defendant.

Charge—Duty of defendant—A charge to the effect that it was the duty of the defendant to use the care of a prudent man under like circumstances to see that nothing took place which would render the situation of the decedent more hazardous than it ordinarily would be in the work upon which he was engaged, was, in view of the facts in the case, as favorable to the defendant as it was entitled to have given.

Evidence proper which meets claim of adverse party—The defendant's claim, supported by evidence, being that it was contributory negligence not to make use of a certain device calculated to lessen the risk in making the repairs in question, it was proper for the plaintiff to show that the defendant had, previous to the injury, directed its employee who was at work with the decedent at the time of the injury not to use such device.

Elements of pecuniary loss to children from death of father—In determining the pecuniary loss to minor children from the death of their father, it is proper to consider, so far as the evidence permits, the physical, moral and intellectual training which they would have received from him during their minority had he lived.

ACTION ON THE CASE for negligence, brought under V. S. 2451 and 2452, by the plaintiff as administrator of Michael Kennedy, deceased. Plea, general issue. Trial by jury, Rutland County, March Term, 1899, *Watson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The decedent while at work upon repairs to a pulp digester in the defendant's mill received injuries which caused his death within two or three days thereafter.

The case is stated in the opinion.

Butler & Moloney for the plaintiff.

Joel C. Baker for the defendant.

THOMPSON, J. I. The defendant excepted to the refusal of the County Court to direct a verdict for it on the ground that the alleged negligence causing the death of the decedent occurred while he was at work Sunday, on the defendant's pulp digester in its paper mill at Bellows Falls, Vt. The defendant also excepted to the charge to the jury on this subject. The instruction was in substance that the plaintiff was entitled to recover if his case was made out in other respects, notwithstanding that the decedent, at the time of the accident, was working for the defendant on Sunday, if the jury found that defendant's negligence was the proximate cause of his death, and his working Sunday, the remote cause.

It is now contended by the defendant that the decedent was working in violation of V. S. 5140, which prohibits the exercise of any business or employment except works of necessity or charity between twelve o'clock Saturday night and twelve o'clock the following Sunday night under a penalty of not more than two dollars, and that consequently the plaintiff is precluded from

recovery. The jury found that the negligence of the defendant was the proximate cause of the death of the decedent and that he was not guilty of contributory negligence.

There is a conflict of authorities on this subject, but the view adopted by the weight of authority is against the contention of the defendant. This view accords with reason and the general principles of the law applicable to torts. The fact that the decedent was working for the defendant on Sunday cannot be said to be either in law or in fact, contributory negligence concurring to produce the injury, nor the proximate cause of it. This view is recognized in *Johnson v. Irasburgh*, 47 Vt. 32, which was decided on the ground that the town was not bound to maintain its highway for use by the plaintiff for an unlawful purpose. *Holcomb v. Danby*, 51 Vt. 435, cited by defendant, was decided on the same ground. *Duran v. Insurance Co.*, 63 Vt. 440, turned upon the terms of the contract on which plaintiff claimed to recover. The court below, without submitting the question of proximate cause to the jury, should have held that it was no defense to defendant's negligence, that the decedent was working for it on Sunday when its negligence caused his death. *Baldwin v. Barney*, 12 R. I. 392; 34 Am. Rep. 670; *Sutton v. Town of Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534; *Baker v. Portland*, 58 Me. 199; 4 Am. Rep. 274; *Phila. W. & B. R. Co. v. Phila. & H. Towboat Co.* 23 How. (U. S.) 209; L. Co-Op. Ed., Book 16, p. 430; *Platz v. City of Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286; *Louisville, etc. Ry. Co. v. Buck*, 116 Ind. 566; 9 Am. St. Rep. 833; *Schmidt v. Humphrey*, 48 Iowa 652; 30 Am. Rep. 414; *Boydon v. Fitchburgh R. R. Co.*, 70 Vt. 125. The motion for a verdict on this ground was properly denied. The charge on this subject was more favorable to the defendant than it was entitled to have given and the exception thereto cannot be sustained.

II. The defendant excepted to the refusal of the court to direct a verdict for it on the ground that the decedent, at the

time of its alleged negligence, was its servant and received the injuries causing his death by reason of the negligence of a fellow servant, another employee of the defendant.

One Spring was a builder and contractor for whom the decedent had worked for many years next before his death. When the defendant had occasion to have work done in the way of certain repairs about its mill, it called on Spring to do it, and he sent his men, including the decedent, to do what was needed. The bill of exceptions, referring to the time when the decedent received the injuries causing his death, states that "Kennedy, while at work on this occasion, was in the employ of Mr. Spring, and no testimony was introduced tending to show that he was either employed or paid or governed or directed by the defendant or any one in its employ." Although all the evidence is referred to in connection with the motion for a verdict, the defendant's counsel has not called our attention to any evidence tending to contradict or modify this statement in the record, nor have we found any having such effect. Standing thus, the question of fellow servant is not involved, as the decedent was the servant of Spring and not of the defendant. *Sherman v. D. & H. Canal Co.*, 71 Vt. 325, and authorities there cited. Therefore, the County Court properly denied the motion as to this ground.

III. Among other things the County Court in substance instructed the jury that it was the duty of the defendant to use reasonable care to see that nothing by itself took place which would render the situation of the decedent while at work in the digester repairing it, more hazardous than ordinary; and that the care the defendant was thus bound to exercise, was the care of a prudent man under like circumstances. To this instruction the defendant excepted. No exception was taken to the failure of the court to give further instructions on this branch of the case. The deceased was killed by steam and sulphurous acid gas let into the digester by the defendant while the decedent was therein repairing the lining thereof by filling with cement the

spaces between the vitrified brick forming the lining. The defendant knew that he was thus at work when the steam and gas were let into the digester, by the failure of a servant of the defendant to properly close a valve in a pipe through which the steam and gas entered. The chance of being thus killed was not one of the ordinary risks incident to this employment of the decedent. The jury must have understood from the language of the charge, that the defendant was not bound to use the care stated, in respect to the ordinary risks attendant upon doing the work in question, and was only liable for negligence on its part that increased the danger beyond the ordinary risk attendant thereon. Applied to the facts of this case, the instruction was certainly as favorable to the defendant as it was entitled to have given, and there was no legal error involved in the language of the instruction.

IV. The jury were instructed that one element, proper to be considered in arriving at the pecuniary loss to the minor children of the decedent, resulting from his death, was the physical, moral and intellectual instruction and training, which they would have received from him during their minority, had he lived, so far as the same was shown by the evidence. To this the defendant excepted.

The education of a child comprises physical, mental and moral training. V. S. 683 provides for mental training, and instruction in good behavior by teachers of competent ability and of *good morals*, for all the children of the State, of school age, at the expense of the taxpayers. The law thus clearly recognizes that intellectual and moral training have a pecuniary value. A sound mind in a sound body, together constitute the ideal physical man. It needs no argument to prove that physical training is as necessary for the well being of a child as mental and moral nurture. The experience of everyday life emphasizes this fact. It is equally apparent that such training has a pecuniary value. It costs money to secure it for a child from those not its parents. V. S. 683 also recognizes the pecuniary value of

physical training, when it includes elementary physiology and hygiene among the studies to be taught in our common schools. The training of the child mentally, morally and physically, by the parent, may be, and often is, more effective and lasting for good, than any instruction received in schools and colleges. The loss of the minor children in this respect was, therefore, proper to be considered in determining their pecuniary loss resulting from their father's untimely death. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252 ; 86 Am. Dec. 297 and note ; *Eames v. Brattleboro*, 54 Vt. 471 ; *Lazelle v. Newfane*, 70 Vt. 440. Also see note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375-383.

V. Talbot was the foreman of defendant's mill. One Flavian was an employee of the defendant at the time of the accident, and was then at work in the digester with the decedent. The defendant claimed and evidence introduced by it tended to show that a device known as the "dead head" should have been put into the steam pipe, entering the digester, before the deceased went to work in it, and that it was contributory negligence not to use it. Thereupon the plaintiff offered to show that Talbot had directed Flavian a month or two before the accident not to use the "dead heads," and against the exception of the defendant, Flavian was permitted to testify that Talbot said there was no need of the "dead heads" so long as there was a good valve there, and that there was no need of putting them in. This evidence was responsive to the offer and tended to show a direction as claimed in respect to the use of a "dead head." If the jury found such a direction was given, it met the claim of the defendant that it should have been used. There was no error in admitting this evidence.

This disposes of all the exceptions urged on the defendant's brief.

Judgment affirmed.

CHAS. W. MITCHELL and MINERVA E. PARKER v. F. W. BLANCHARD, HENRY E. MITCHELL and LYMAN F. CABOT'S
ADMINISTRATOR.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion Filed December 8, 1899.

Avails of a sale of trust property—The law stamps the avails of a sale of property devised in trust with the same trust which the will imposed upon the property itself. The recognition of the trust by the parties to the conveyance does not make it a trust created by them.

Probate Court—Jurisdiction under V. S. 2613—Trusts—The Probate Court has jurisdiction, under V. S. 2613, to appoint a trustee of property the use of which passes by will, as well as of that the use of which passes by operation of law.

Definition—"Descends" as used in V. S. 2613—The word "descends" as used in V. S. 2613, is to be construed in accordance with the canon of construction, that, if words taken in their technical sense will make a statute inoperative in whole or in part, they will be taken in their popular sense.

Probate Court—Jurisdiction under V. S. 2613—Discovery—V. S. 2613, in giving the Probate Court the same power as to the enforcement of the trusts therein mentioned that it has in case of guardians of minor children, confers upon it ample power to compel discovery in respect to such trusts.

CHANCERY. Heard on demurrer to the bill. Windsor County, June Term, 1899, *Start*, Chancellor. Demurrer sustained, and bill adjudged insufficient and dismissed. The orators appealed.

The case is stated in the opinion.

Gilbert A. Davis for the orators.

William Batchelder and *J. C. Enright* for the defendants.

ROWELL, J. The trust fund in question was derived from the sale of the fee of real estate, the use of which was willed to

the orators for life and to the survivor of them, and on the death of both, the property, or the avails thereof, are to be equally divided among their legal heirs. The bill gives a detailed history of the fund, and traces it into the hands of the defendant Mitchell, part of it before, and the rest of it after, the appointment by the probate court of the defendant Blanchard as trustee thereof. It alleges that the defendants have conspired together to defraud the orators thereout, and prays that said Blanchard be enjoined from acting as trustee, and another appointed in his stead, to collect, recover, and take charge of said fund and account therefor under the order and direction of the Court of Chancery; that the other defendants be enjoined from disposing of said fund or any part thereof, and that they and the said Blanchard make certain discovery in respect thereto; and for general relief.

We do not regard as material the allegation that the expenses of administration were paid and said real estate turned over to the orators, who took possession thereof under the will; nor the allegation that on the sale of said estate said fund was set apart in trust for the benefit of the orators. The law stamped the avails of the sale with the same trust that the will imposed upon the property itself, no question being made but that the sale was authorized, and the fact that the parties to the conveyance set apart the avails as alleged, does not make it a trust created by them, as contended, but only shows that they recognized the trust created by the will, and intended to have it carried out.

The sufficiency of the bill, both as to discovery and relief, is challenged by demurrer, for that the probate court can afford adequate remedy in the premises; and we are of that opinion.

The jurisdiction of the probate court to appoint a trustee of this fund, depends upon the construction to be given to the word "descends," as used in section 2613 of the Vermont Statutes, whereby it is enacted that the probate court may appoint trustees in cases not otherwise provided for, when the use of property, real or personal, *descends* to a person for life or for years. The orators contend that the word should be taken in its strict legal

sense, and confined to the passage of land by operation of law on the death of an ancestor intestate, Co. Lit. 13b, 237a ; that it is opposed on the one hand to what takes place when land, on the death of a person, passes to another by gift or limitation to him by designation ; and on the other hand, to the devolution of personal property, which is governed by the rules of distribution. But it is impossible to confine the word to real property, for the statute expressly extends it to personal property. This does not infringe the rule that when technical legal terms are used in a statute, they are to be taken in their established common-law signification ; for it is a part of the rule that they are not to be so taken when a contrary intent appears.

Nor can we confine the word to the passage of the use by operation of law, without depriving the statute of its entire force as to life estates, now that dower and curtesy are taken away, if indeed it would accord it any force as to such estates before that, for it is doubtful whether those estates *descended* within the strict legal meaning of that term, although they vested by operation of law. But if they did descend, and the word is thus confined, the statute never had any effect as to life estates beyond those estates, for in no other case did or does land descend for life, and in no case, ever, for years, unless we except the interest that minor children once took in the homestead until majority, but which they no longer take. Much less does personal property, or any interest therein, ever descend for life or for years. We are speaking, of course, of estates created by law, and not of estates otherwise created for the life of another or for years that are vested in the intestate.

It is a canon of construction that every clause and every word of a statute must be given effect if possible ; and that if words taken in their technical sense will make a statute inoperative in whole or in part, they will be taken in their popular sense. Applying this rule, we construe the word "descends" as used in the section under consideration, to include cases in which the use passes by will as well as cases in which it passes by operation of

law. And this is the construction that obtains in our probate courts, as we learn on inquiry of many of our oldest and most experienced probate judges.

As to discovery, it is sufficient to say that the probate court has power to compel it, and that, therefore, resort to chancery therefor is unnecessary.

The section in question gives the probate court the same power to enforce the trusts therein mentioned that it has in case of guardians of minor children. Section 2804 authorizes that court to require such a guardian to render and settle his account at any time; and section 2808 requires the court, when necessary, to examine every guardian upon oath as to the truth and correctness of his account. That court has, therefore, power to compel the defendant Blanchard, trustee as aforesaid, to discover.

Section 2771 provides that if a guardian, creditor, or heir apparent of a ward, complains to the probate court that a person is suspected of having concealed, embezzled, or conveyed away, money, goods or chattels of the ward, the court may cite such person to appear before it, and may examine him on oath upon the matter of the complaint; and the next section provides that if the person so cited does not appear and submit to examination, or does not answer the interrogatories lawfully put to him, the court may commit him until he submits to its order. These provisions, being applied to this class of trusts, *mutatis mutandis*, are ample to compel the other defendants to discover.

Affirmed and remanded.

GEORGE A. BOYDEN, Administrator, v. FITCHBURG RAILROAD CO.

May Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed December 21, 1899.

Imputed negligence—Agency.—The plaintiff's intestate having been killed while riding with companions in the joint prosecution of a common purpose, if the negligence of his companions, to one of whom the driving had been intrusted, contributed to the accident, such negligence was imputable to the plaintiff's intestate, and the plaintiff could not recover in consequence thereof.

Burden of proof—Presumption.—The burden was on the plaintiff to show that the decedent and his companions were free from contributory negligence. There is no presumption that they were in the exercise of due care and prudence.

Evidence how viewed on motion for a verdict.—In determining whether the court should have directed a verdict for the defendant, on the ground that the absence of contributory negligence was not shown, the evidence must be viewed in the aspect most favorable to the plaintiff, and it cannot be said, as a matter of law, that in this case there was no evidence tending to show that the decedent and his companions were in the exercise of the care and prudence of a prudent man under like circumstances.

Lack of due warning by Railroad Co. bears upon the duty of the traveller.—The jury found the defendant railroad company guilty of negligence in not seasonably blowing the whistle and ringing the bell, and the absence of such due warning is a circumstance to be taken into consideration in determining whether the decedent and his companions exercised due care and prudence, for negligence cannot be attributed to one who is deceived under circumstances calculated to deceive a prudent man.

Evidence of compliance with the duty to "look and listen."—That the decedent and his companions, who were all killed, did "look and listen" when they stopped and before starting to cross the defendants' tracks, may be reasonably inferred from the circumstances in evidence and the disposition of persons to take care of themselves and avoid danger.

Request to charge unsound in part.—One part of a request to charge embodied the proposition that it was the duty of the driver of the team in which the decedent was not to start to cross the track until it was exposed to

view as far as it could be seen, which according to one witness was one hundred and six rods, and as this was unsound, as a proposition of law, the court properly refused to comply with the request as a whole.

Request immaterial under finding of the jury—Request based on isolated fact.—

One part of a request was based upon the assumption that a whistle was blown and a bell rung when the jury found that they were not, and hence a refusal to comply with this part of the request was harmless to the railroad company. The other part of the same request would have had the jury measure the duty of the decedent's party by their reliance upon their sense of hearing alone, when there were other material facts and circumstances to be considered in connection therewith, and this part of the request was, therefore, unsound.

*Sunday travel lawful—*Travelling on Sunday has not been unlawful in this state since R. L. 4315 was repealed by No. 133, Acts of 1894.

*Remarks of counsel governed by the evidence—*In objecting to an improper question the plaintiff's counsel began a remark which, so far as it went, may and may not have been in accordance with the evidence in the case. The record does not disclose how this was, and error does not appear.

ACTION ON THE CASE to recover damages resulting from the death of the plaintiff's intestate, Edward Roque. Plea, general issue. Windham County, March Term, 1898, *Taft*, J., presiding. Trial by jury. Verdict and judgment for the plaintiff. The defendant excepted.

It appeared that a double-tracked railroad owned and operated by the defendant is, near the village of Pownal, twice crossed by the same highway at points about a thousand feet apart, and that the easterly crossing is near the defendant's bridge over the Hoosick river; that on Sunday, July 21, 1895, the decedent and three companions were riding together over this highway in a double team driven by one of the party other than the decedent; that they first approached the westerly of the two crossings, and that as they did so a freight train eastward bound on the southerly track whistled for that crossing and that they drove over the same just ahead of the train, and then drove along the highway towards the other or easterly crossing, which they reached while the freight train was passing over it or just before it reached it.

The testimony of the plaintiff tended to show that the decedent's party stopped their team about thirty feet from said easterly crossing and waited for the freight train to pass by, and that thereafter the driver started the team slowly to pass over the crossing, and had driven partially over when an express train, westward bound on the further or northerly track, came into view ; that the horses were then just passing over the second or northerly track, and that thereupon the driver stood up and pulled back on the reins, but that the team was struck by the train and the decedent and his three companions killed.

The defendants requests from the ninth to the fifteenth inclusive presented in different aspects the claim that the plaintiff could not recover because his decedent at the time he was killed was travelling on Sunday, and so was wrongfully on the highway.

The case in other respects material to the decision is stated in the opinion.

Waterman & Martin for the plaintiff.

Batchelder & Bates for the defendant.

WATSON J. At the close of the evidence, the defendant moved for a verdict, for the reason that the evidence showed the driver of the carriage and the deceased guilty of contributory negligence ; that the plaintiff had not shown the deceased free from contributory negligence ; and that the case did not show negligence on the part of the defendant, its officers or servants in the management of the train. The motion was overruled, and the case submitted to the jury, to which the defendant excepted. The defendant makes no claim of error under the last clause of the motion.

The record shows the plaintiff's decedent and his companions engaged in the joint prosecution of a common purpose, and therein, each was the agent of the others, and each was responsible for the consequences resulting from the acts of the others, or any of them ; and if the driver was not in the exercise of that care and prudence required by law, and thereby contributed to

the accident, his negligence was imputable to the decedent. *Carlisle v. Sheldon*, 38 Vt. 440; *Donnelly v. Brooklyn City R. R. Co.* 109 N. Y. 16. And the burden was upon the plaintiff to show, not only that his decedent, but also that his decedent's companions, for whom he was then responsible in this regard, were not guilty of any negligence which contributed to the happening of the accident. That they were in the exercise of due care and prudence, cannot be presumed, and unless the evidence tended so to show, the plaintiff failed in one essential element of his case, and it was the duty of the Court to order a verdict for the defendant. *Hyde v. Jamaica*, 27 Vt. 443; *Bovee v. Danville*, 53 Vt. 183; *Worthington v. Central Vt. R. R. Co.* 64 Vt. 107.

The decedent and his companions had that day passed over the westerly crossing twice, and the easterly crossing once, and knew the railroad to be of double track, and, seeing the freight train going east, they knew the southerly track was used for trains going in that direction. They stopped their team within about thirty feet of the crossing and waited for the freight train to pass. Some of the evidence tended to show that the freight train had not then reached the crossing, and some, that it was passing over it. This train was forty rods long, and some of the evidence tended to show that the caboose had just gone over the crossing, and some, that it was in the bridge one hundred and ten feet easterly of the crossing, when they started along to cross the track. Easterly of the bridge the railroad track curved southerly, was upon a fill of about thirteen feet above the natural surface, passed through an open meadow, and the northerly track was hid from view by the freight train as it passed along on the southerly track, for a distance of more than the length of the train. As the freight train passed on easterly from the bridge, its whistle was continually blowing, by reason of which, with the noise of the train, the noise of the express train, west-bound on the northerly track, was not noticed by the persons sitting in a wagon on the northerly side of, and near to, the crossing, and the

fair inference is, that, for the same reason, it was not noticed by the decedent nor his companions. As to how far easterly the railroad track could be seen by a person in a wagon in the vicinity of where they stopped in the highway, the evidence was conflicting, some of it tending to show it could be seen for a distance of ninety rods beyond the bridge, and some a less distance. From the crossing to the easterly end of the bridge, was two hundred and seventy feet. The express train was running at the speed of forty miles an hour; and whether its whistle was blown, or its bell rung, before it reached the bridge near the crossing, the evidence was conflicting, the plaintiff's tending to show they were not, and the defendant's tending to show the whistle was blown back eighty rods from the crossing. Was it the duty of the decedent and his companions to wait until the noise of the freight train and of its whistle had subsided, and the temporary obstruction to their view of the track easterly had been removed, that they might more effectually look and listen for west-bound trains on the northerly track, before driving on to the crossing? And was a failure so to do, negligence as a matter of law? In determining this question, the evidence must be considered in its most favorable aspect for the plaintiff.

The jury found the defendant guilty of negligence in running the express train at an unreasonable speed, and in not blowing the whistle nor ringing the bell, as required by law when nearing a highway crossing. The object of such a requirement is to warn travellers upon the highway of approaching danger, that they may act accordingly, and refrain from going upon the crossing until the danger has passed; and it is for the protection, not only of people travelling upon highways, but also of passing trains and the many people travelling therein. Although such negligence on the part of a railroad company, affords no excuse to the traveller upon the highway for his not exercising due care and prudence to avoid injury, yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care and prudence required

or not; for negligence cannot be imputed to a person who is deceived under circumstances calculated to deceive a prudent man. *Chicago, etc. R. R. Co. v. Hedges*, 3 West. Rep. (Ind.), 892; *The Cleveland, etc. R. R. Co. v. Crawford*, 24 Ohio St. 631; 15 Am. Rep. 633; *Tyler v. New York, etc. R. R. Co.*, 137 Mass., 238.

One witness gave positive testimony that the freight train had not reached the crossing when the decedent and his companions stopped to let it pass. If this be true, and if it be also true, that from where they stopped, the railroad track could be seen for ninety rods easterly of the bridge, then, when they stopped, the railroad track was clear for a distance of one hundred and six rods easterly from the crossing, and remained clear in front of the freight train, and within view, until they started along to cross the track. It was up grade to the crossing and the team went slowly.

It may be reasonably inferred from the circumstances, taking into consideration the disposition of persons to take care of themselves and avoid injury, that, while waiting for the freight train to pass, and until they started along, the decedent and his companions looked and listened to guard against any west-bound train which might be approaching on the northerly track,—*Lazelle v. Newfane*, 69 Vt. 306; *Baltimore, etc. R. R. Co. v. Griffith*, 159 U. S. 603,—and not seeing nor hearing any, thought it safe to cross the track.

A jury might find from the evidence and the legitimate and reasonable inferences therefrom, that when the team started along, the express train had not come in view, with the track unobscured, and when approaching, the noise made thereby so mingled with, or was drowned by, the noise of the freight train, that, in the absence of the usual warning by whistle or bell, the decedent and his companions were deceived into thinking there was no train approaching. The express train was running at the speed of fifty-eight and two-thirds feet a second, and had the

track been unobscured, it was at the place of the accident within twenty-nine seconds after it could first have been seen.

But if the decedent and his companions waited until the rear end of the freight train was more than one hundred and ten feet from the crossing, how long should they have waited, and how far should they have allowed that train to go, before the requisite care and prudence would permit them to start along?

In determining the question of contributory negligence, there were material facts in dispute from which inferences were to be drawn; and in determining the question of whether the motion for a verdict was improperly overruled, we are not to consider what inferences the court would draw from such facts, but what inferences may a jury legitimately and reasonably draw therefrom. It is clearly a case where intelligent and fairminded men may reasonably differ, and it cannot be said, as a matter of law, that there was no evidence tending to show the decedent and his companions in the exercise of the care and prudence of a prudent man under similar circumstances, and therefore, the motion for a verdict was properly overruled. *Latremouille v. Bennington, etc. Ry. Co.*, 63 Vt. 336; *Worthington v. Central Vt. R. R. Co.*, *supra*; *Lazelle v. Newfane*, *supra*.

The defendant insists that the court erred in refusing the following requests to charge: 7th request. "If at the time the team approached the railroad crossing, the freight train hid from view the west-bound track, so that, by reason thereof, the driver and the others in the carriage were unable to see the west-bound track or a train of cars approaching the crossing upon it, as the evidence of both parties tended to show, it was the duty of the driver to stop his team before driving upon the crossing, and wait until the freight train had passed along and away from the crossing far enough to expose to view the west-bound track as far as they were able to see the said track easterly from where they were in the highway, or so far, at least, as to make it reasonably safe for them to drive over the crossing; and that if the driver neglected to do this, the plaintiff cannot recover."

That the decedent and his companions stopped their team some thirty feet back from the crossing, there was no dispute. This request is in the alternative, the fore part of which asks the court, in effect, to instruct the jury that if the freight train hid from view the west-bound track so the driver and the others in the carriage were unable to see it or a train of cars approaching the crossing thereon, it was their duty not to start along until the freight train had passed and was away far enough from the crossing to expose to view the west-bound track as far as they were able to see it easterly from where they were in the highway, which, as some of the evidence tended to show, was one hundred and six rods. Independent of the evidence tending to show other facts and circumstances bearing upon the question of contributory negligence, it could not be said, as a matter of law, that unless they did wait that length of time, the plaintiff could not recover. This part of the request being unsound, it is unnecessary to consider the other alternative therein for the court properly refused the whole. *Berry v. Griffin*, 10 Md. 27; 69 Am. Dec. 123.

The 8th request, —“ If, as the train approached near to the crossing, the noise of the freight train was so great as to prevent the driver and the others in the carriage from hearing either the whistle or bell of the engine of a train approaching on the west-bound track, it was negligence on the part of the driver of the team to drive upon the crossing until the freight train had moved far enough easterly, from the crossing, so that its noise would not interfere with his hearing the bell or whistle of the engine, or a train of cars approaching the crossing on the west-bound track.” This request was also in the alternative, and the jury having found by their verdict that the express train whistle was not blown nor the bell rung, until the train was at the bridge near the crossing, the non-compliance with the fore part thereof was harmless to the defendant. By the other alternative the court is asked to instruct the jury that it was negligence on the part of the driver of the team to drive upon the crossing until the freight

train had moved far enough easterly, so that its noise would not interfere with his hearing a train of cars approaching the crossing of the west-bound track. This would be giving the sense of hearing undue importance. The opportunity for seeing that track easterly, and an approaching train thereon, and the fact that no warning was given of such approaching train by whistle blown or bell rung, were material facts and circumstances to be considered by the jury in connection with the fact that the hearing of such approaching train was obstructed by the noise of the freight train. It was the duty of the jury in determining the question of contributory negligence, to consider all the facts and circumstances bearing thereon, and not select any particular facts, as controlling the question, to the exclusion of other evidence. *Thornton's Executors v. Thornton's Heirs*, 39 Vt. 122; *Gordon v. Tabor*, 5 Vt. 103; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408. A compliance with this request was properly refused.

The court properly refused to comply with defendant's requests from the ninth to the fifteenth inclusive. The law prohibiting travelling on the Sabbath, contained in section 4315 R. L., was repealed by No. 133, Laws of 1894, since which time, there has been no law in this state making such travelling unlawful. V. S. 5140.

The defendant claimed and its evidence tended to show, that the decedent and his companions were intoxicated at the time of the accident. In rebuttal, the plaintiff improved, as a witness, Benjamin O. Barber, who testified that he examined the bodies after the accident and detected no evidence of intoxicating liquor about them. In cross-examination, defendant's attorney asked the witness the question: "You heard that day, didn't you, that they were intoxicated?" To which the plaintiff's attorney objected, saying: "If the railroad company began circulating reports of their intoxication right off that day"—the defendant's attorney here interrupted and asked for an exception, and plaintiff's attorney did not conclude the remark. The question was

held inadmissible, and the remark improper, and, if it was a matter of exception, one was allowed. There was testimony in the case tending to show that the railroad company circulated reports, but when, and what the reports were, the exceptions do not show.

The question called for hearsay, and was properly excluded. The remark of plaintiff's attorney, until interrupted, may or may not have been in accordance with the evidence tending to show reports circulated by the defendant. If it was, no harm could have resulted to the defendant therefrom; and, as the record does not show whether it was or not, error does not appear. No other exceptions were relied upon in argument.

Judgment affirmed.

Munson J., dissents.

NELSON BACON v. F. W. HUNT & Co.

October Term, 1899.

Present: ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed January 12, 1900.

Intoxicating liquor—Res judicata—In a previous action between the same parties a certain contract for liquors was found to have been made in Boston and not in Burlington, the place of the making of the contract being in that case the material question. Certain items sued for in this action being conceded to be for liquors purchased under the same contract, the place of the contract was, as to those items, *res judicata*.

Questions of fact for the jury—In this action, which was to recover back money paid for intoxicating liquor, an examination of the evidence shows that there was clearly a question of fact as to whether the contract was made wholly in Massachusetts, or partly in this state, and the determination of that question was, therefore, properly left to the jury.

ASSUMPSIT. Plea, general issue. Trial by jury. Chittenden County, March Term, 1899, *Taft*, J., presiding. Verdict and judgment for the defendants. The plaintiff excepted.

The case is stated in the opinion.

Hamilton S. Peck for the plaintiff.

Seneca Haselton and *D. J. Foster* for the defendants.

TYLER, J. Action, general assumpsit, to recover certain sums of money which the plaintiff had paid the defendants, who were wholesale liquor dealers in Boston, Mass., for intoxicating liquors purchased of them, as he claimed, in violation of the laws of this state. He claimed that all such purchases made in the years 1893 and 1894 were under a contract made by him with their agent in Burlington in April, 1893, while the defendants insisted that all the purchases were pursuant to an agreement made by them with the plaintiff in Boston in January of that year.

1. An action was tried between these parties at the September term, 1897, of the Chittenden County Court, in which the defendants were plaintiffs and recovered of the defendant, who is plaintiff here, the purchase price of certain liquors sold and delivered to him. The material question there was whether the contract upon which those liquors were purchased was made in Burlington, or in Boston, and the jury found that it was made in Boston. The plaintiff conceded upon the trial in the present case that the last six items of his specification were payments for liquors purchased under the contract that was in controversy in the former suit and adjudged to have been made in Boston; therefore the court below correctly held that that question was *res judicata*.

II. The defendants' evidence tended to show that the plaintiff was at their store in Boston in January, 1893; that they then gave him the price per gallon of a certain brand of whiskey and of a certain brand of rum, and that it was agreed that he might at any time order these liquors on four months credit; that on

May 3, 1893, the plaintiff sent them a letter directing them to ship to him a barrel of whiskey and a barrel of rum of the respective brands, which letter the defendants received in Boston, and pursuant thereto, forwarded the liquors to the plaintiff in Burlington.

On April 6, 1893, the defendants' agent was at the plaintiff's drug store in Burlington and took his order for a quantity of ale, and another order for a barrel of whiskey and a barrel of rum of those brands. The latter order seems to have been given orally, was written and signed by the agent and was sent to the defendants in Boston, with a memorandum upon it to hold for the plaintiff's order. The defendants filed it and put it away without entering it upon their books. On May 3rd the plaintiff sent the defendants the letter above referred to, as he claimed, in accordance with the order given to the agent. The defendants shipped the liquors pursuant to the directions in the letter, but, as they claimed and as their evidence tended to show, in pursuance of the agreement which they claimed to have made with the plaintiff in Boston.

The plaintiff denied making an agreement in Boston, but admitted that the defendants gave him prices of liquors and that he told them they might "lay out" a certain barrel of whiskey for him.

Upon this evidence the court could not hold as a matter of law that the contract was made in this state.

It was a controverted question whether the plaintiff's letter was written pursuant to an agreement made in Boston, or pursuant to his order given to the agent in Burlington. The facts that the defendants' agent called upon the plaintiff in Burlington, on April 6, took the order from him for the whiskey and rum, and sent it to the defendants with the memorandum upon it did not necessarily change the arrangement which the defendants claimed was made in Boston in January, but it may have been pursuant to it.

There was clearly a question of fact whether the contract was made in the state of Massachusetts, or partly in this state so as to fall within the rule in *Starace v. Rossi*, 69 Vt. 303, and in *Berwick Brewing Co. v. Oliver*, 69 Vt. 323. The ruling was correct and the

Judgment is affirmed.

A. A. SPARKS, Receiver, v. WARREN ESTABROOKS.

October Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed January 22, 1900.

Action at law by receiver—Murley, Receiver, v. Allen, 71 Vt. 377, is referred to as decisive of this case, it being an action at law by a receiver.

Special assumpsit. Heard on demurrer. Caledonia County, June Term, 1899, *Thompson, J.*, presiding. Demurrer overruled strictly *pro forma* and without hearing, and declaration adjudged sufficient. The defendant excepted.

Bates, May & Simonds for the plaintiff.

Dunnett & Slack for the defendant.

TYLER, J. The declaration alleges that the Fidelity Mutual Fire Insurance Company of Philadelphia issued and delivered certain fire insurance policies to the defendant, who thereby became a member of the company and bound to pay all assessments, within certain limits, duly levied upon him by the directors; that certain assessments were duly levied, and that the defendant refused to pay the amount due from him. The action is brought in the name of the company's receiver who was duly appointed by a competent court in Philadelphia. The

case comes here upon the defendant's demurrer to the declaration.

The question of the right of a party to maintain an action at law in his own name, when he has not the legal title to the property in controversy, is decided in *Murtey, Receiver, v. Allen*, 71 Vt. 377. For the reasons stated in that case, *the pro forma judgment, overruling the demurrer and adjudging the declaration and amendments thereto sufficient, reversed; demurrer sustained; declaration and amendments adjudged insufficient, and cause remanded.*

STATE v. THOMAS LEONARD, Appellant.

October Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, THOMPSON and WATSON, JJ.

Opinion filed January 24, 1900.

Liquor prosecutions—Former acquittal—The respondent's dwelling house having been searched for intoxicating liquor and he tried and acquitted for owning, keeping and possessing intoxicating liquor on a complaint, under which the proceedings related to said search, the judgment of acquittal was conclusive that he was not keeping liquor for unlawful sale when the search was made.

Questions of fact for the jury—One W. having testified that at two different times on the day of the search he and a companion obtained beer of the respondent, and the testimony of the respondent and his witnesses, uncontradicted, unless by that of W., being that the search was continuous from before the first visit of W. until after his second, it was for the jury to say whether the sales to W. were made before or after the search.

Husband's liability for misdemeanors of wife—Agency—A sale of intoxicating liquor made by the wife in the presence of her husband and by his direction is his act. A sale made by the wife in his absence may be his act through her agency. Therefore an instruction to the jury to the effect that the respondent may have been guilty of the acts of the

wife was correct; and it is to be presumed that the charge, not recited in full, explained the circumstances in which he might be so guilty.

Convictions for selling, etc. intoxicating liquor—Extent of bar.—Under V. S. 4471, a former conviction of a wife of offenses of selling intoxicating liquor contrary to law is a bar, even in a prosecution against her, only as to the offenses specified in the proceedings upon which judgment was rendered in the former prosecution.

COMPLAINT for selling, furnishing and giving away intoxicating liquor contrary to law. Trial by jury. Bennington County, June Term, 1899, *Munson*, J., presiding. Verdict, guilty of one offense. Judgment on verdict. The respondent excepted.

The specification of the state charged the respondent with unlawful sales of intoxicating liquor at his dwelling house. One of the days specified was July 4, 1896.

On trial one White a witness for the state testified that on said July 4, 1896, at one o'clock in the afternoon, together with one Nugent, he went to the dwelling house of the respondent and that he and said Nugent then each procured of the respondent one glass of beer; that later in the same day, and at the same place, they each procured another glass of beer of the respondent.

It appeared that on that day officers of the law searched said dwelling house for intoxicating liquor, and that on the same day, and immediately after the search, the respondent was arrested on a charge of owning, keeping and possessing intoxicating liquor on that day with intent to sell, furnish and give away the same without authority and contrary to law. The proceedings in that case related to the search and the respondent was on trial acquitted.

In this case the evidence on the part of the respondent, which was uncontradicted, except so far as it was contradicted by White's testimony above referred to, was to the effect that the officers were engaged in searching said dwelling from a time before that fixed by White as the time of his first visit thereto until after his second visit.

The respondent claimed that the acquittal referred to was a bar as to the offenses which White's testimony tended to show were committed on said July 4, and asked the court to charge the jury that they could not consider such evidence. The court refused so to charge.

Another day designated in the specification of the state was July 4, 1897, and evidence was introduced of one sale on that day by the respondent in person, of one by his wife in his presence, and of another by his wife in his absence, all at the respondent's dwelling house.

It appeared that on July 29, 1898, upon a complaint dated after July 4, 1897, the respondent's wife had, upon her plea of guilty, been convicted of fifteen offenses of selling, furnishing and giving away intoxicating liquor at the respondent's said dwelling house.

The respondent conceded that on July 2, 1894, he had been convicted of selling, furnishing and giving away intoxicating liquor. He testified and introduced other evidence tending to show that since said July 2, 1894, he had not sold, furnished or given away intoxicating liquor in this state. He further testified that since that time he had kept liquor and beer at his house for his own use, and that probably his wife had sold some.

The respondent claimed that he could not, under the evidence, be convicted of any sale made by his wife; that there was a presumption that the sales which the evidence tended to show were made by her personally July 4, 1897, were included in the fifteen sales to which she pleaded guilty July 29, 1898, and that she having paid the penalty therefor the respondent could not be convicted by reason of any such sales.

In the charge the court left the jury at liberty to convict the respondent of any of the sales made by the wife.

Edward L. Bates, State's Attorney, for the State.

Barber & Darling for the respondent.

TYLER, J. I. It appeared that on July 4, 1896, the respondent's dwelling house was searched ; that he was arrested upon a complaint for owning, keeping and possessing intoxicating liquor at his dwelling house, with intent to sell, furnish and give away the same in violation of law, and that he was tried and acquitted.

One White, a witness for the state, testified that about one o'clock in the afternoon of that day he and a companion each obtained a glass of beer of the respondent, and later on the same day obtained another glass.

The evidence on the part of the respondent, which was uncontradicted unless by White's testimony, was that the search for liquor on that day was continued from before White's first visit until after his second visit, and therefore the respondent requested the court to instruct the jury not to consider the evidence of offenses committed by him on that day.

The judgment of the justice's court was conclusive that the respondent was not keeping liquor for unlawful sale when the search was made, but for anything that appears in the case the sales to White and Nugent may have been after the search and arrest. The testimony of the respondent and his witnesses, though uncontradicted, only *tended* to show that all the sales to White and his companion were before the search, but whether they were in fact before or after was a question of fact for the jury. The case does not state whether the trial was held on the day of the arrest or subsequently.

As the respondent kept liquor and beer in his house for his own use, he may have made unlawful sales to White and Nugent, after the arrest, from those liquors, or he may have obtained and sold other liquors to them. His wife may have been the keeper and he the seller as her agent either before or after the arrest. These were questions of fact, and the court properly denied the request.

II. The respondent claimed that he could not be convicted of any sales made by his wife on July 4, 1897, for the reason

that on July 29, 1898, she was convicted upon a plea of guilty of fifteen first offenses, upon a complaint dated after July 4, 1897.

The state's evidence tended to show a sale by the respondent at his house on the evening of that day, a sale at the same time and place by the wife in his presence, and a sale by the wife when he was not present. It was a question of fact whether these three sales, if made, were included in the fifteen sales which the wife pleaded guilty to having made.

The judgment against the wife would have been a bar, even in a subsequent prosecution against her, only as to the offenses specified in the proceedings upon which the judgment was rendered. As to other offenses she might have been proceeded against as though they had been committed subsequent to that judgment. V. S. 4471.

If the sale by the wife in the respondent's presence was by his direction then it was his act. The sale by her in his absence may have been his act through her agency, therefore the instruction of the court was correct that the respondent may have been guilty of the acts of the wife.

The charge is not recited in full, but it doubtless explained in what circumstances the respondent might be guilty of unlawful sales by his wife.

Judgment that the respondent takes nothing by his exceptions ; judgment and sentence.

GEORGE H. KING, Receiver, v. ALEX COCHRAN.

October Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON, START and
WATSON, JJ.

Opinion filed January 29, 1900.

Action at law by a receiver—Murtey, Receiver, v. Allen, 71 Vt. 377, determines the question in this case.

ACTION OF DEBT. Heard on demurrer to the declaration. Caledonia County, June Term, 1899, *Thompson, J.*, presiding. Demurrer overruled *pro forma* and without hearing, and declaration adjudged sufficient. The defendant excepted.

The declaration alleged, among other things, the incorporation of the Washington Savings Bank of Seattle, under the laws of the State of Washington, its subsequent insolvency, the due appointment of the plaintiff as its receiver by a court of that state, an order of said court directing the receiver to levy an assessment against the stockholders of said bank of seventy per cent of the par value of their stock, and the necessity and propriety of the levy.

It further set out that by a law of the state of Washington the stockholders of a bank there organized are individually responsible equally and ratably for its indebtedness to the amount of the par value of their stock in addition to the amount invested in their shares, and that the defendant was a stockholder of said bank subject to assessment under said order of court and said law.

T. J. Deavitt and E. H. Deavitt for the plaintiff.

Dunnett & Slack for the defendant.

TAFT, C. J. The question determinative of this cause was decided in *Murtey, Receiver, v. Allen, 71 Vt. 377*, adversely to the plaintiff.

Judgment reversed, demurrer sustained, declaration adjudged insufficient, and judgment for the defendant.

STATE v. CHARLES WAITE.

October Term, 1899.

Present : ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed January 30, 1900.

V. S. 4460—Fermented cider—By V. S. 4460 fermented cider is placed in the category of intoxicating liquors and the general prohibition of the sale of such liquors except by an authorized agent applies to it.

V. S. 4463—Unfermented cider—With reference to sales, the word “cider” as used in V. S. 4463, which prohibits the sale of cider in a place of public resort or to an habitual drunkard, and otherwise permits it, means unfermented cider.

V. S. 4465—Intoxicating liquor—Cider—In V. S. 4465, which prescribes the penalty for selling, furnishing or giving away, or owning, keeping or possessing with the intent to sell, furnish or give away “intoxicating liquor or cider in violation of law,” fermented cider is included under the generic name of intoxicating liquor, and the word “cider” means unfermented cider.

Illegal sales of fermented cider—Allegations and proof—In this case the concession by the respondent that he had made within three years eleven sales of fermented cider, showed him guilty of eleven offenses under a complaint charging him in the common statutory form with selling intoxicating liquor contrary to law.

INFORMATION in the statutory form for selling, furnishing and giving away intoxicating liquor and cider without authority. Windsor County, December Term, 1898, *Taft*, J., presiding.

The respondent conceded that he had made eleven sales of fermented cider within the time covered by the prosecution, on premises, the character and use of which were described, and requested the judgment of the court upon such concession. Judgment of guilty of eleven offenses under the information. The respondent excepted.

W. W. Stickney and J. G. Sargent for the State.

A. E. Cudworth, J. C. Enright and E. R. Buck for the respondent.

WATSON, J. By section 4460, V. S., selling, furnishing and giving away, "spirituous or intoxicating liquor, or mixed liquor, of which a part is spirituous or intoxicating, or malt liquors or lager beer," is prohibited; and it is therein provided that the phrase "intoxicating liquors," where it occurs in chapter 187, V. S., shall be held to include such liquors and beer, and fermented cider. By section 4463, V. S., it is provided that nothing in that chapter shall prevent the manufacture, sale and use of cider; but that no persons shall sell or furnish cider at or in a victualling house, tavern, grocery, shop, cellar or other place of public resort, or at any place, to an habitual drunkard. And section 4465, V. S., prescribes the penalty for selling, furnishing or giving away, or owning, keeping, or possessing with intent to sell, furnish or give away, "intoxicating liquor or cider, in violation of law."

These three sections are the only ones in the chapter relating to the traffic in intoxicating liquor, wherein cider is referred to by name, and in construing the same, force must be given to each section in that regard, if possible so to do. By section 4460, fermented cider is placed in the category and under the generic name of intoxicating liquors, and wherever it is, by law, unlawful to traffic in intoxicating liquor, it is unlawful to traffic in fermented cider, one of the species thereof. And section 4463, as far as it relates to selling and furnishing cider, has reference to unfermented cider, such as is not by law within the term "intoxicating liquors." It follows that the provision in section 4465, as to "intoxicating liquor," includes fermented cider, and that the word "cider," as therein used, has reference only to such cider as is not included in that phrase. With this construction, these three sections of the statutes are consistent with each other, and each is given the force intended by the law-making power.

The information charges the respondent in the statutory form with, at divers times, selling, furnishing and giving away "intoxicating liquor and cider without authority", etc.; but contains no allegations as to whether the cider was sold, furnished,

or given away in a place of public resort, or to an habitual drunkard. The respondent conceded that, among other things, he had made, "To divers persons, within three years, eleven sales of fermented cider"; but contends that the conceded facts do not show the sales to have been made in a place of public resort or to an habitual drunkard, and that if they do show the former, the information is insufficient upon which to found a conviction.

But under the construction of the statute, above given, the information need only set forth in common form, the selling, furnishing, and giving away, of intoxicating liquor,—*State v. Reynolds*, 47 Vt. 297—and the concession of the respondent of the eleven sales of fermented cider rendered him guilty thereunder, and he was properly so adjudged.

Judgment that respondent take nothing by his exceptions.

Let sentence be pronounced and execution done.

FANNY C. HURLBURT v. PASCAL MILLER'S ESTATE.

January Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed February 8, 1900.

Probate appeals—Discretionary reference—It is discretionary with the County Court to appoint a referee to try and determine an issue of fact joined in an appeal from the decision of commissioners to allow claims against the estate of a deceased person.

The same—Constitutional law—Jury Trial—V. S. 2595—V. S. 1437—In such a case the parties are not entitled to a jury trial as a matter of constitutional right, and the statutory right conferred by what is now V. S. 2595 is qualified by the later enactment embodied in V. S. 1437.

APPEAL from the disallowance of the plaintiff's claim by the commissioners on the estate of Pascal Miller. The plaintiff declared in general assumpsit. The defendant's pleas were, the general issue, payment, accord and satisfaction, the statute of limitations and offset. Franklin County, September Term, 1899, *Start*, J., presiding. The court, on motion of the defendant, and against the objection of the plaintiff, referred the cause. The plaintiff excepted.

C. G. Austin for the plaintiff.

Wilson & Hall for the defendant.

ROWELL, J. The question is whether the county court has power to appoint a referee to try and determine an issue of fact joined in an appeal from the decision of commissioners to allow claims against the estate of a deceased person. Section 2595 of the Vt. Sts. provides that if a question of fact is to be decided in such an appeal, issue may be joined thereon under the direction of the court and a trial had by jury. In *Lynde v. Davenport*, 57 Vt. 597, it was held that this section, which was then sec. 2279 of the Revised Laws, gave a right to such a trial. But in 1884, which was after that case arose, a statute was passed that empowered the county court to appoint referees in cases in which the issue of fact is not such as to entitle the parties to a jury trial as matter of right under the constitution. This provision of that statute is now embodied in V. S. 1437. It is settled that in probate appeals the parties are not entitled to a jury trial as matter of right under the constitution; and as the act of 1884 was passed subsequent to what is now V. S. 2595, it qualifies the right to a jury trial thereby conferred, and makes it discretionary with the county court. In *Re Welch's Will*, 69 Vt. 127.

Judgment affirmed and cause remanded.

CITY OF MONTPELIER, v. JOHN SENTER.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON, START and
WATSON, JJ.

Opinion filed February 8, 1900.

Charter of Montpelier—Retrospective legislation—No. 184, Acts of 1898, amending the charter of the city of Montpelier by striking out words prohibiting compensation to the Mayor and Aldermen, and giving them a salary, gave the mayor compensation from the time the act took effect, but was not retrospective, and authorized no compensation to the mayor for the expired portion of his current term of office.

Legislative intent—Definition of "salary"—The intent to give compensation for past services is not apparent, although the act used the word "salary", which means a *per-annum* compensation, for that is apportionable, and means no more than at the rate of so much *per-annum*.

Remedial statutes—Considerations of justice in construction of statutes—The intent to give compensation for past services not being manifest from the act itself, it cannot be given such effect on the ground that it is remedial, for it is not, nor on considerations of justice, for the receiving of compensation for past services is not, under the circumstances, so just a thing as to require a construction that will give it.

Retrospective legislation not favored—There is no constitutional limitation on the legislature concerning the matter, but retrospective legislation is not favored.

ASSUMPSIT. Plea, general issue. Trial by court on an agreed statement of facts. Washington County, March Term, 1899. Thompson, J., presiding. Judgment for the plaintiff, *pro forma* and without hearing, for the sum of three hundred dollars. The defendant excepted.

The case is stated in the opinion.

Frederick P. Carleton, City Attorney, for the plaintiff.

John H. Senter, defendant, *pro se*.

ROWELL, J. The defendant was elected mayor of the city at its annual meeting in March, 1898, for the term of one year.

At that time the city charter prohibited compensation to the mayor and the aldermen for their official services. But by No. 184, Acts of 1898, which took effect November 30 of that year, the charter was amended, among other ways, by striking out the words prohibiting such compensation, and giving the mayor a salary of \$300, and each of the aldermen a salary of \$150. Shortly before the expiration of their terms of office, the mayor and each of the aldermen were paid the full amount of their salary for the year; and this action is brought to recover the money paid to the defendant.

The office of mayor not being contractual in its nature, and there being no constitutional limitation on the Legislature concerning the matter, it is not claimed, and could not well be, that the Legislature had not the power to give the defendant a salary for the whole or a part of his then current term of office. It is equally clear that it gave him compensation from the time the act took effect; and the only question is, whether it gave him compensation before that time.

Retrospective legislation is not favored, and is prohibited by the constitution of some of the states, as being highly injurious, oppressive, and unjust; and nowhere will retrospective effect be given to a statute unless it appears that it was the intent of the Legislature that it should have such effect. When such effect would impair a right or do a wrong, it will not be given; but when, without such results, it is apparent that such operation was intended, that intent will prevail. And although such intent is not manifest from the act itself, yet if the result of such an operation would be so just as to constitute a reason for giving it, and there is nothing in the act to prevent it, such reason will be allowed to operate, and the act to have that effect. This is indorsed in *Sturgis v. Hull*, 48 Vt. 302, as a correct general statement of the law of the subject.

It is further said in that case, that when a statute will admit of either construction, and it appears that a retrospective

operation is necessary to accomplish the purpose of the Legislature, and no right will be thereby impaired and no wrong done ; or when a statute is purely remedial, and does not attempt to take away vested rights ; or, it might have been added, relates solely to procedure in courts, such operation will be given to it, but not otherwise.

It is obvious that the part of the act in question can have a retrospective effect only on the ground that it is remedial, which it does not appear to be, neither from the act itself, nor from anything dehors the act.

It is sufficiently comprehensive for present purposes to define a remedial statute as one designed to cure a mischief or remedy a defect in existing laws, common or statutory, however arising. But here was no mischief to cure nor defect to remedy; for that municipal officers shall serve without compensation, is neither. Town officers receive no compensation for their services, only as it is voted to them, which the town may do or not, as there is no statute on the subject. Neither is there any necessity for giving this act retrospective effect in order to accomplish the purpose of the Legislature, for it does not appear that it was its purpose to give compensation for past services, although it used the word "salary," which means a *per-annum* compensation ; for that is apportionable, and the act means no more than at the rate of so much *per annum*. Nor is the receiving of compensation for past services so just a thing as to require a construction that will give it ; for it cannot be said to be unjust, that is, contrary to the standard of right, that a municipal officer shall serve for nothing when he accepts the office knowing that the laws prohibit compensation.

Douglas County v. Timme, 32 Neb. 272, 34 Am. & Eng. Corp. Cas. 456, is relied upon to show that a retrospective effect should be given. There compensation was increased during the term of office. It is difficult to gather from the case that the act was given retrospective effect. The contention seems to have been whether it applied to those in office at the time it was

passed or only to those thereafter elected, and it was held to apply to those in office.

Judgment reversed, and judgment for the plaintiff to recover what the defendant received for salary from the commencement of his term till the passage of the Act, with interest thereon from the rendition of the judgment below.

STATE v. ROCCO LOTTI.

January Term, 1900.

Present : TAFT. C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed February 12, 1900.

Intoxicating liquor—Sale to a boarder—The furnishing of intoxicating liquor by a boarding house keeper to his boarders, as a part of the meals for which they pay, is, in effect, a sale to them of so much of the liquor so furnished as they drink, and the keeping of intoxicating liquor to be so furnished is unlawful.

INDICTMENT for selling, furnishing and giving away intoxicating liquor contrary to law. Washington County, September Term, 1899, *Thompson, J.*, presiding. Trial by jury. Verdict, guilty. Judgment on verdict. Exceptions by respondent.

The only exception was to the instruction recited below. The testimony to which the instruction was applicable was given by the respondent and sufficiently appears from the opinion.

The court instructed the jury that while the respondent had a right to keep wine and ale to use himself, or for the use of his wife, mother and children, and for members of his private family, that if they found that he kept such wine and ale with the intent to furnish the same to his boarders for hire—as testified by the respondent—such keeping would be in violation of law, and the jury would be warranted in returning a verdict of guilty.

Richard A. Hoar, State's Attorney, for the State.

Lord & Carleton and F. L. Laird for the respondent.

TART, C. J. The respondent kept a boarding house, with sixteen boarders and lodgers, and two or three boarders. At dinner and supper he furnished them with ale and wine, and they were accustomed to drink it. The boarders and lodgers paid the respondent sixty cents per day for their board and lodging. The furnishing of the ale and wine by the respondent to his boarders, as a part of their meals, was in effect a sale to them of so much ale and wine as they drank, and the keeping of it by the respondent for that purpose was unlawful. The case is not within sec. 4462 V. S. providing that the words "give away" as used in Chap. 187 V. S. shall not apply to the giving away of liquors by a person in his private dwelling. The question was whether the transaction was a sale, not a gift, and the case was submitted upon the ground that the ale and wine were furnished for pay as a part of the meals. There was testimony to support the claim, the charge was correct, and the verdict must stand.

If a "person in his private dwelling" furnishes a man his dinner, and with it, and as a part of it, intoxicating liquors, and receives pay for it, such transaction is a sale of the liquors so furnished.

Judgment that there is no error in the proceedings and the respondent takes nothing by his exceptions. The judgment rendered upon the verdict in the County Court is affirmed, and sentence and execution ordered.

F. F. FABOR v. L. H. GREEN.

January Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and
WATSON, JJ.

Opinion filed February 12, 1900.

Sale of methyl alcohol—Methyl alcohol, or wood spirit, being a deadly narcotic poison, not intended to be used as a beverage, and which cannot be so used, its sale is not prohibited by V. S. Chapter 187, relating to the traffic in intoxicating liquors.

Scope of V. S. Chapter 187—The laws against the illegal traffic in intoxicating liquors were intended to include only such liquors as could be used as a beverage.

ASSUMPSIT to recover the purchase price of fifty gallons of methyl alcohol. City Court of Montpelier, January 30, 1900, *Smilie, J.* Trial by the court, and judgment for the plaintiff. Defendant excepted.

The defence was that methyl alcohol is intoxicating liquor within the meaning of V. S. Chapter 187, and that therefore no recovery could be had for the purchase price. The facts stated in the opinion were found by the trial court.

Lord & Carleton for the plaintiff.

H. C. Shurtliff for the defendant.

WATSON, J. The plaintiff seeks to recover the purchase price of fifty gallons of methyl alcohol, commonly known as wood spirit or wood alcohol, sold by him to the defendant.

The defendant contends that this alcohol is an intoxicating liquor, the sale of which is prohibited by law, and therefore no recovery can be had by reason of section 4464 of Vermont Statutes.

Such alcohol is obtained by the destructive distillation of wood, is ranked as a narcotic poison, and if drunk either pure, adulterated, reduced many times its weight in water, other alco-

hol or fluid, it kills the person drinking it. It was not intended to be used as a beverage and could not be so used.

The laws against the illegal traffic in intoxicating liquors were intended to include only such liquors as could be used as a beverage—*Russell v. Sloan*, 33 Vt. 656—and to construe the statute as prohibiting the sale of other liquids similar in name but so much more poisonous in nature as to prevent their being used in that way, would be giving it an extraneous and unnatural force not intended.

“Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.” *Lau Ow Bew v. United States*, 144 U. S. 47.

Judgment affirmed.

STATE v. CHARLES JOHNSON.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START and WATSON, JJ.

Opinion filed February 14, 1900.

Irregularities in grand jury room—Demurrer—Motion to dismiss—Motion in arrest—Irregularities in the grand jury room are not reached by a demurrer, a motion to dismiss or a motion in arrest, for none of these fastens upon matter not disclosed by the papers.

Recital of evidence and ascertainment of facts distinguished—No course having been taken in this case which involved an inquiry as to the matters complained of, the case presents a statement of evidence tending to establish certain facts, but no ascertainment of the facts.

INDICTMENT for selling and furnishing intoxicating liquor contrary to law. Washington County, March Term, 1899, *Thompson*, J., presiding. Plea, not guilty. Trial by jury. Verdict, guilty. Judgment on verdict. Exceptions by respondent.

On account of matters disclosed by a witness for the State as to certain proceedings in the grand jury room, the respondent, by leave of court, but without withdrawing his plea of not guilty, filed a general demurrer which was overruled, and the trial ordered to proceed. For the same cause the respondent filed a motion to dismiss, and after verdict and before judgment, moved in arrest. These motions were overruled.

Richard A. Hoar, State's Attorney, for the State.

W. W. LaPoint for the respondent.

MUNSON, J. The court overruled successively the demurrer, the motion to dismiss, and the motion in arrest, by which the respondent sought to avail himself of certain matters testified to on the trial as having occurred in the grand jury room. There was no error in this, for none of these pleadings fastened upon irregularities not disclosed by the papers. No course having been taken that involved an inquiry as to the matters complained of, the case presents a statement of evidence tending to establish certain facts, but no ascertainment of the facts. It is apparent that a plea in abatement was the only proceeding adapted to the relief sought; and the respondent should have moved for some action that would have enabled him to get the benefit of that plea.

We dispose of the case upon these grounds, without considering the fact that the demurrer was entertained without a withdrawal of the plea of not guilty, and without considering whether the matters complained of, if properly presented, would vitiate the indictment.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions.

WILLIAM H. WILLEY v. BOSTON AND MAINE RAILROAD CO.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed February 14, 1900.

Duty to one in self-incurred danger—Plaintiff's negligence remote, defendant's proximate—The plaintiff drove upon the track of the defendant railroad company and was injured. There was evidence tending to show that the defendant did not do all that it could to prevent disaster after it discovered the plaintiff's peril, and, therefore, it was improper to direct a verdict for the defendant, whether or not the plaintiff could, as a matter of law, be said to be guilty of negligence in going upon the track as he did.

ACTION ON THE CASE in which the plaintiff sought to recover for injuries received by him by being run into by a train of the defendant while he was attempting to drive over the track of the defendant at a highway crossing. Plea, general issue. Orleans County, March Term, 1899, *Start*, J., presiding. Trial by jury. Verdict directed for the defendant. Judgment on verdict. The plaintiff excepted.

The case, so far as it was material to the decision, is stated in the opinion.

E. A. Cook and *J. W. Redmond* for the plaintiff.

Young & Young for the defendant.

MUNSON, J. The court directed a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence. It is not necessary to inquire how the case stood in this respect, for there was evidence tending to establish facts upon which the plaintiff could recover although negligent. When it became apparent that the plaintiff was going upon the track, it was the duty of the defendant to do what it could to avoid injuring him. *Trow v. Vermont Central R. R. Co.*, 24 Vt. 487; Note 30 Am. Rep. 190; *Deans v. Wilmington & Weldon R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902 and note; *Inland etc.*

Co. v. Tolson, 139 U. S. 531: Book 35 Law. Ed. 270; see *Magoon v. Boston & Maine R. R. Co.*, 67 Vt. 177.

The fireman testified that the plaintiff was first seen from a distance of about thirty rods, and that he was then about fifteen feet from the crossing; that the brake was applied about fifteen rods from the crossing, just as the horse was going upon the track; that there are two applications of the brake, the service and the emergency, of which the second is much the stronger; that the service application is obtained by throwing the lever into the nearer or service notch, and the emergency by throwing it into the further notch; that the engineer gave the emergency application; that when witness was examined before the railroad commissioners, in reply to the question, "Do you know if the engineer applied the emergency brake?", he replied, "I do not think so; he might have got the emergency application of the brake"; that he meant by this that the engineer made the service application so quick that he thought possibly he got the emergency application; and further, "I thought that he got the emergency application of the brake when he put it around to the service notch." It appeared that the horse got across the track, and that the engine struck the buggy.

This evidence entitled the plaintiff to claim to the jury that the defendant did not do all that it could to prevent the disaster, and that its failure in this respect was the cause of his injury.

As the judges are not entirely agreed in their views regarding the plaintiff's conduct, and as the case may be varied upon another trial, we do not pass upon the question of contributory negligence.

Judgment reversed and cause remanded.

E. J. HAWLEY v. E. B. HURD and THE RUSSELL LUMBER &
COAL CO., Trustee.

October Term, 1898.

Present: ROSS, C. J., TAFT, MUNSON and THOMPSON, JJ.

Opinion filed February 14, 1900.

Trustee process—Scope of defence by trustee—A trustee can defend upon the ground of rights acquired by an assignee who does not appear as claimant.

Trustee process—Debt payable without the state—A resident trustee is chargeable upon a debt payable to a non-resident in the state of his domicile. *Towle v. Wilder*, 57 Vt. 622, *Nichols v. Hooper*, 61 Vt. 295, and *Craig v. Gunn*, 67 Vt. 92, reviewed.

Trustee process—Negotiable paper—Transfer to bank without the state—Negotiable paper transferred to a bank without this state may be attached by trustee process before notice of the transfer.

Trustee process—V. S. 1306—Constitutional law—The provision of V. S. 1306, which exempts from attachment by trustee process negotiable paper transferred before due to a bank within the state, does not work a discrimination against banks without the state from which they are protected by Art. 4, Sec 2 of the Federal Constitution or by Art. 14, Sec. 1 of the Amendments thereto.

Constitutional law—Corporations as citizens—Corporations, including national banks, are not citizens within the meaning of that term as used in Art. 4, Sec. 2 of the Federal Constitution providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

Constitutional law—Corporations as citizens—Corporations, including national banks, are not citizens within the meaning of that term as used in Amendment 14, Sec. 1 of the Federal Constitution providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Constitutional law—Corporations as persons—Jurisdiction over corporations—A corporation is a person within the meaning of that word as used in Amendment 14, Sec. 1 of the Federal Constitution providing that no state shall deny to any person within its jurisdiction the equal protection of the law; but a corporation not created by this state, and not doing business here under conditions that subject it to process issuing from the courts of this state, is not within its jurisdiction.

Constitutional law—National banks as instrumentalities of the Federal government—The incidental discrimination, made by V. S. 1306 against banks without this state, touches only the general business relations of such banks, and does not impair their utility as instrumentalities and agents of the Federal government.

ASSUMPSIT. Bennington County, June Term, 1898, *Rowell*, J., presiding. Trial by court. Judgment for the plaintiff against the principal defendant, and against the trustee on facts found and reported by a commissioner. The trustee excepted.

The case is stated in the opinion.

Barber & Darling for the plaintiff.

W. B. Sheldon for the trustee.

MUNSON, J. The plaintiff and the trustee are residents of this State, and the defendant is a resident of New York. The indebtedness on account of which the trustee was held chargeable in the court below was evidenced by two promissory notes, executed by the trustee in this State, made payable to the defendant's order at the First National Bank of Hoosic Falls, N. Y., and discounted by that bank in the regular course of business before notice of the service of the trustee process was received.

It is not necessary to consider the conflicting decisions concerning the location of a debt for purposes of attachment. It is held in this State that a resident trustee is chargeable upon a debt payable to a non-resident in the state of his domicile. *Nichols v. Hooper*, 61 Vt. 295. In this case the court expressly refused to be governed by *Towle v. Wilder*, 57 Vt. 622, saying there was nothing to show upon what point that case turned. In saying, as the court did in *Craig v. Gunn*, 67 Vt. 92, that it found no occasion to depart from the decision in *Towle v. Wilder*, it evidently assumed that the case was disposed of upon the question of jurisdiction over the trustee; for *Nichols v. Hooper* was cited as determinative of the other points involved.

V. S. 1306 first provides generally, that negotiable paper may be attached by trustee process before notice of transfer. It provides further, however, that negotiable paper actually trans-

ferred to a bank in this State before due shall be exempt from such attachment. This leaves paper transferred to a bank without the State to be governed by the general provision; and the trustee contends that this restricted exemption works a discrimination against National banks without the state, from which they are protected by Art. 4, Sec. 2 of the Federal Constitution, and Art. 14, Sec. 1 of the Amendments thereto.

Although this question is raised by the trustee, and without the bank being made a party, it is to be considered and determined as if presented by the bank as claimant of the fund. A trustee can defend upon the ground of rights acquired by an assignee who does not appear. See *Holmes v. Clark*, 46 Vt. 22. If these notes have become payable to the bank by virtue of a transfer which the Federal Constitution requires us to recognize, the trustee cannot be held.

Art. 4, Sec. 2 provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. Corporations are not citizens within the meaning of the term as here used. *Paul v. Virginia*, 8 Wall. 168: Book 19 Law. Ed. 357; *Pembina etc. Co. v. Pennsylvania*, 125 U. S. 181: Book 31 Law. Ed. 650. It is true that many of the reasons given for this holding are inapplicable to corporations created by act of Congress, and that the rights of National banks were not involved in any case which asserts the rule. But the distinction suggested cannot be made without ignoring the positive statement of the cases cited, that the term applies only to natural persons.

Art. 14, Sec. 1 of the Amendments provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. It is held in *Orient Insurance Co. v. Daggs*, 172 U. S. 557: Book 43 Law. Ed. 552, that a corporation is not a citizen within the meaning of this provision; and the extended discussion in earlier cases as to what privileges and immunities were intended seems to exclude the

possibility of an exception in favor of National Banks. See *Slaughter House Cases*, 83 U. S. 36 : Book 21 Law. Ed. 394.

The section last cited also declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. The term "person" as here used is held to include corporations. *Minneapolis, etc. R.R. Co. v. Beckwith*, 129 U. S. 26 : Book 32 Law. Ed. 585. But this check upon the state relates only to persons "within its jurisdiction." A corporation not created by this State, nor doing business here under conditions that subject it to process issuing from the courts of this State, is not within its jurisdiction. *Blake v. McClung*, 172 U. S. 239 : Book 43 Law Ed. 432.

It must be remembered however, that the right of a National bank to protection from state interference does not depend upon its being brought within any of these provisions. As an instrumentality of the Federal government, it is protected from hostile legislation by the supremacy of the Federal Constitution. Independently of specific prohibitions, the State has no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of constitutional laws enacted to carry into execution the powers vested in the general government. *McCulloch v. Maryland*, 4 Wheaton 316 : Book 4 Law. Ed. 579. The State can exercise no control over a National bank, nor in any wise affect its operation, except as Congress may permit. *Farmers, etc. Bank v. Dearing*, 91 U. S. 29 : Book 23 Law. Ed. 196.

But there is a well recognized limitation to the protection which this Federal supremacy secures to a National bank. It protects the bank only from such legislation as tends to impair its utility as an instrumentality of the Federal government. *Waite v. Dowley*, 94 U. S. 527 : Book 24 Law. Ed. 181. As regards the construction of contracts, the acquisition and transfer of property, the collection of debts and the liability to suit, the bank remains under the control of the State. *First National Bank of Louisville v. Kentucky*, 76 U. S. 353 : Book 19 Law. Ed. 701.

The most that can be said of the discrimination complained of is, that it enables a bank within the State to discount with safety paper which a bank without the State could not discount without risk, and that to this extent it operates as an incidental restriction upon the business of the latter bank. It is clear that this touches only the general business relations of the bank, and can have no appreciable effect upon its continuance and utility as an agent of the Federal government.

It is not claimed that our statute is in conflict with any act of Congress.

Judgment affirmed.

SHELDON POOR HOUSE ASSOCIATION v. TOWN OF SHELDON.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and
WATSON, JJ.

Opinion filed February 20, 1900.

Pauper law—Residence—If a town keeps one of its paupers in another town the pauper is a resident of the supporting town and the atmosphere of the supporting town, in legal effect, envelops the pauper.

Pauper law—Education of pauper children by the town of their residence—A town in which paupers of school age reside, is alone chargeable with the duty of providing for their education, although they are kept in another town.

Public Schools—Instruction of paupers—V. S. 688, 689—The school directors of a town in which paupers of school age from another town are kept, may receive them into the schools under such terms and restrictions as they deem best, and the school directors of the town liable for the support of such paupers may provide for their instruction in the public schools of the town in which they are kept, and may pay for such instruction.

CHANCERY. Franklin County, September Term, 1899, *Start*, Chancellor. On bill, answer and master's report the court, *pro forma* and without hearing, rendered a decree making per-

petual a temporary injunction granted upon the bringing of the bill. The defendant appealed.

The orator is an association and body corporate, organized in accordance with the provisions of V. S. Chap. 145, consisting of various towns in Franklin County, including the defendant town. It owns and occupies a farm in the defendant town on which are supported paupers of said various towns, including paupers of school age.

In 1897 the defendant town refused to permit children of school age, inmates of the poor house on said farm who were paupers of other towns than the defendant, to attend the public schools of the defendant without the payment of tuition. This bill was thereupon brought praying that the defendant, its officers, servants and teachers, might be enjoined and restrained from not admitting to its public schools children of school age kept upon said farm.

C. G. Austin and *H. A. Burt* for the orator.

Emmet McFeeters and *F. W. McGettrick* for the defendant.

TAFT, C. J. A town may support one of its paupers in an adjoining or other town. The towns represented by the orator, have the right to support their paupers in the poor house of the association in the defendant town. While a pauper of one town is kept and supported by it in another town, it is in law, a resident of the town supporting it. The atmosphere of the latter town, in legal effect, envelops the pauper as fully and thoroughly as if the pauper was kept in the town liable for its support. *Barnet v. Ray*, 33 Vt. 205; *Leicester v. Brandon*, 65 Vt. 544; *Sandgate v. Rupert*, 67 Vt. 258.

The paupers of school age of the towns represented by the orator who are kept at the poor house in Sheldon are in contemplation of law, residents of the towns respectively supporting them and are not residents of Sheldon. Not being residents of Sheldon, that town is under no duty to support them in any re-

spect nor to furnish them educational privileges. The school directors in Sheldon may receive them into the Sheldon schools in the manner and under such terms and restrictions as they deem best, and the school directors of the towns from which the paupers are sent to Sheldon, may provide for the instruction of such pauper pupils in the public schools of Sheldon, and may pay for such instruction. V. S. 688-9. If the authorities of the town of Sheldon are not obliged to receive such pauper pupils, then it is the duty of the towns from which the paupers are sent, to make provision for their education.

Decree reversed, and cause remanded with direction to dismiss the bill. The costs in the Court of Chancery to be there determined.

RUTLAND-CANADIAN RAILROAD COMPANY v. CENTRAL VERMONT
RAILWAY COMPANY.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON
and WATSON, JJ.

Opinion filed February 20, 1900.

*Railroads—Jurisdiction of commissioners under V. S. 3860 and 3864—*Commissioners under V. S. 3860 and 3864 appointed on the petition of one railroad company to fix upon the manner of crossings over and connections with the railroad of another company, and the amount of compensation to be made therefor, have not jurisdiction to establish a line for the petitioner which would involve the acquisition of a right of way by the exercise of the right of eminent domain.

*Eminent domain—*The establishment for one railroad company of a line about 1200 feet in length over and along lands acquired and actually used and occupied by another railroad company for the purposes of its incorporation and not connecting with the line of such other company, would involve the taking of a right of way by the exercise of the right of eminent domain.

Eminent domain—Property already taken for a public use—Property already taken for a public use cannot be taken for another public use without legislative authority expressly given or necessarily implied.

Same—Authority given in general terms to take by the right of eminent domain is not sufficient to authorize the taking, for an inconsistent purpose, of property already devoted to a public use, and necessary for the purpose to which it is devoted.

Same—Implied authority to take—Implied authority to take can only arise from the language of the legislative act, or from facts making such taking necessary to the beneficial enjoyment and efficient exercise of rights and privileges granted.

Same—Implication from necessity—The necessity which raises an implication of authority to take, for a public use, property already taken for another public use, must arise from the nature of things over which the corporation desiring to take has no control, and not from a necessity created by such corporation for its convenience or economy.

Same—When such implied authority arises from necessity, the taking can be only to the extent of the necessity.

Jurisdiction to award a connection in lieu of a crossing—The petitioner having, under the principles of law applicable to the facts of this case, neither express nor implied authority to acquire a right of way and establish an independent line through the petitionee's yard, commissioners appointed under V. S. 3860 and 3864 had jurisdiction to award a connection and not a crossing.

Costs—It not appearing that any fault of the petitionee necessitated the proceedings, and the petitioner having failed in its main contention, the petitionee was allowed to recover its costs, and the petitioner ordered to pay the commissioners' fees.

This case came before the Supreme Court at the January Term, 1900, on the question of the confirmation of an award of commissioners filed November 7, 1899. The commissioners decided that they had jurisdiction over the whole subject of crossing and in lieu thereof of connections, and among other things reported as follows:

“If the commission has jurisdiction over the whole matter, we find and decide that in view of the convenience of the public in connection with the joint interchange of through, and the more convenient handling of local traffic, and of the inconven-

ience and danger to the public in consequence of the proposed and necessary street crossing at grade on College Street between the City of Burlington, and the freight and passenger stations of the Central Vermont Railway Company and steamboat docks; the interests of the public, as well as the interests of both parties to the controversy, will be best served by a connection with, and by a joint use of tracks and station of the defendant. The connection to be made by single track, to be constructed by, and at the expense of the Rutland-Canadian Railroad, from the point where their line enters upon the lands of the Central Vermont on the north, across the side track of the Standard Oil Company (which shall be properly protected with signals), and continuing southward between the main track of the Central Vermont, and the track to the west thereof, to a point on their main line near the engine house as now located, where connection will be made with the two tracks to be provided by the Central Vermont, and maintained and operated as a double track system for both roads, to and through the Central Vermont station to a connection with the Rutland road at the south side of College Street; to be operated under conditions and in manner to be hereafter described."

Frederick H. Button for the petitioner.

Chas. M. Wilds for the petitionee.

ROWELL, J. The petition alleges that it is necessary for the petitioner's railroad to cross the petitionee's railroad, grounds, and property at Burlington, with necessary tracks, turnouts, sidings, switches, and other conveniences; and prays for the appointment of commissioners to "fix upon the manner of such crossings and connections and the amount of compensation to be made therefor."

Commissioners were appointed, and reported to a special term of this Court appointed for that purpose. By their report it appears that the road of the petitionee connects with that of the Rutland Railroad Company at Burlington, each having a

railroad yard at its end adjoining that of the other ; that the road of the petitioner will reach the yard of the petitionee on the west side of its main track at the north end of its yard ; that by connections with the tracks of the petitionee it could reach the tracks and yard of the Rutland road, and make a through connection with that road, and traffic connections with the road of the petitionee ; that the petitioner disclaimed any desire to connect with the tracks of the petitionee, or with the Rutland road by the tracks and yard of the petitionee, but claimed the right to cross with tracks under the main track of the petitionee at the north end of its yard, and to connect with the Rutland road by tracks along the east side of, and avoiding, the main tracks of the petitionee, according to a location submitted ; that that line would cross the lands and one side-track of the petitionee for a considerable distance, thence, after crossing the roadway of the petitionee under the tracks of its main line, run on the grounds of the petitionee along its main line about 1200 feet in a cut to be made of a depth sufficient to permit such crossing under, and would then cross the ground whereon the engine-house of the petitionee stands and tracks leading to it lie, passing through said engine-house, and thence along Lake Street, which was laid as a public highway over lands of the petitionee, and along and across which the petitionee has side tracks, some of which would have to be removed and others crossed, to College Street ; and thence over other lands, to the yard and tracks of the Rutland road, independently of, and without uniting or connecting in operation with, the road of the petitionee ; and that the petitioner disclaimed any desire to have any point or manner of crossing the petitionee's road determined by the commissioners otherwise than by including these approaches, substantially along and upon this location, to the point of crossing under the main tracks of the petitionee.

The commissioners thought that the establishment of a line along the line and lands of the petitionee, to and beyond the point of crossing the petitionee's line, without uniting or connecting with it, over lands acquired by the petitionee and actually

used and occupied by it for the purposes of its incorporation, would involve the acquiring of a right of way by exercise of the right of eminent domain, and that that was a matter not submitted to them; and that, in view of the disclaimers of the petitioner, there was nothing left for them to determine.

The Court agreed with the commissioners, and held that the establishment of the line asked for would involve the acquisition of a right of way by exercise of the right of eminent domain, which was a matter not submitted to them and not within their jurisdiction; and recommitted the report, with instructions to proceed according to their commission, if the petitioner desired further action on their part.

Further action having been desired, the commissioners again heard the parties, when the petitioner offered evidence only for an under crossing at the point proposed by it, and claimed that the commissioners had no jurisdiction of any other question; while the petitionee claimed that they had jurisdiction of the whole matter, and that, in the circumstances, the petitioner should connect its road with the Rutland road over the petitionee's tracks, and that the petitioner should use the petitionee's depot. The petitioner said it did not withdraw all claim for a connection and for going through the petitionee's yard, if the commissioners decided that they had jurisdiction of the whole matter. The commissioners did decide that they had jurisdiction of the whole subject of crossing, and in lieu thereof, of connections, and have awarded a crossing, as claimed by the petitioner, if the petitioner is entitled thereto without regard to the question of a connection by use of the tracks through the petitionee's yard; but if they had jurisdiction of the whole matter, they award a connection and not a crossing.

The petitioner claims that the commissioners erred in deciding that they had jurisdiction to determine between an independent crossing and a joint use of the petitionee's tracks, and contends that it has a right to an independent route, and asks therefor.

It is the law of this State that property already taken for a public use cannot be taken for another public use without legislative authority expressly given or necessarily implied. *Barre Railroad Co. v. Other Railroad Companies*, 61 Vt. 1, 13. And such implication arises only from the language of the act or from a state of facts showing such taking to be necessary in order to beneficially enjoy and efficiently exercise the rights and privileges granted; and then the taking can be only to the extent of the necessity, and that necessity must arise from the nature of things over which the corporation desiring to take has no control, and not from a necessity created by such corporation for its convenience or economy. 10 Am. & Eng. Ency. of Law, 2d ed., 1095. Authority given in general terms, therefore, is not sufficient to authorize the taking for an inconsistent purpose, of property already devoted to a public use and necessary for the purpose to which it is devoted. Note to *Appeal of Sharon Railroad Co.*, 9 Am. St. Rep. 142-3. Thus, in *Worcester & Nashua R. R. Co. v. Railroad Commissioners*, 118 Mass. 561, the statute authorized the Boston, Barre & Gardner Railroad Company to extend its road to a certain union passenger station in the City of Worcester, and for that purpose to locate, construct, and maintain its road within the location of any other railroad corporation in said city; and it was held that this did not authorize the taking of another railroad company's property, but that the land over which the new location was made still remained a part of the old location also. The court applied the doctrine above stated, and said that a right to extend, locate, construct and maintain a railroad is doubtless sufficient to authorize the taking of lands necessary for that purpose when there is nothing in the statute to restrict its effect; but that no franchise granted to one railroad corporation confers the right, without express terms or necessary implication, to appropriate to its use lands already devoted to a like purpose by the location of another railroad. So in *Housatonic R. R. Co. v. Lee & Hudson R. R. Co.*, 118 Mass. 391, it is held that a charter to build a railroad between

certain points, without prescribing the course and direction, but leaving that to be determined and established by the corporation, does not, *prima facie*, give any power to lay out the road over land already devoted to, and within the recorded limits of, another railroad. The court said that it is not to be presumed that the Legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express terms or by necessary implication; and that such implication can be found only in the language of the act or from application of the act to the subject-matter, so that the railroad could not be laid, in whole or in part, by reasonable intendment, on any other line; that in the charter in question there were no such words, except those authorizing an entry upon, a uniting with, and use of, the railroad of another corporation at a certain place; but that it did not appear that there was any physical necessity that the defendant's location should be made within the location of such other company as it had been.

It is said in *The Matter of the City of Buffalo*, 68 N. Y., at page 175, that in order for the implication to arise from a general grant of power, the face of the act must show it, or it must appear from the application of it to the particular subject-matter that some special object sought to be attained by the exercise of the power granted cannot be attained in any other place nor in any other manner.

Applying these principles to the case in hand, the question presented is of easy solution. The petitioner's charter authorizes it to construct, maintain, and operate a railroad for public use from some point in the City of Burlington on or near the railroad of the Rutland Railroad Company, to some convenient points on the Canada line and the New York line in the town of Alburgh without prescribing its course or direction. It gives it the right of eminent domain, and all the rights and privileges that the general law confers upon railroad companies and corporations to acquire title and possession of property covered by the location

of its road. It also gives it the right to cross or connect with any railroad on its right of way, to be availed of under the general law if the parties cannot agree. All of these rights and privileges are granted in general terms and not otherwise, and there is no language in the charter from which an implication can arise that the Legislature intended to give the petitioner authority to acquire a right of way through the petitionee's yard, used and occupied by it, as the commissioners find, for the purposes of its incorporation, and thereby cut said yard in two by an independent line of which the petitioner would be seized and have the exclusive possession and control. Nor do the facts before us show a necessity for the petitioner to have such a right of way in order to the beneficial enjoyment and efficient exercise of the rights and privileges granted to it; for the commissioners find that the interest of both parties, as well as that of the public, will be best served by a joint use of the petitionee's tracks and station. *The Central Vt. Railroad Co. v. The Woodstock Railroad Co.*, 50 Vt. 452, is full authority against the petitioner's right to an independent line, and in favor of the jurisdiction that the commissioners assumed in this case.

Therefore their award, as far as it relates to the undergrade crossing, is disaffirmed, but in all other respects it is confirmed.

It not appearing that any fault of the petitionee's necessitated the bringing of the petition, and the petitioner having failed in its main contention, let the petitionee recover its costs, and let the petitioner pay the commissioners' fees.

R. J. WADE, Administrator with the will annexed, v. E. A.
BUTTON and RICHFORD SAVINGS BANK AND TRUST CO.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed February 24, 1900.

Simple or dry trust—The mere receiving of money from another and the holding of it to that other's use, constitutes no more than a simple or dry trust, and there is nothing to prevent the one from whom the money is received, and for whom it is held, from disposing of the fund as he may see fit.

Creation of voluntary trust—In the case of money so held a direction in writing, executed and delivered by the one for whom the money is held to the holder or naked trustee, directing the payment of the money to certain persons named if the donor does not live to use it up, and the subsequent holding of the money under such writing, constitute a voluntary trust for the benefit of the persons named, subject to be defeated only by the using up of the money by the donor in his life-time.

A valid voluntary trust not defeated by a subsequent will—A voluntary trust so created is not defeated by a will subsequently executed under which a different disposition of the property is made.

Interest accrued—The beneficiaries under such a trust are entitled to the interest of the fund from the time of the death of the donor as well as to the fund itself.

ASSUMPSIT. Plea, general issue. Franklin County, September Term, 1899, *Start*, J., presiding. Trial by court. Judgment for the plaintiff against the defendant, E. A. Button. The defendant, E. A. Button, excepted.

The case is stated in the opinion.

W. D. Stewart, Hogan & Royce and *J. A. Flint* for the plaintiff.

Rustedt & Locklin and *Wilson & Hall* for the defendant Button.

THOMPSON, J. About July 27, 1893, the defendant, E. A. Button, and her husband, Alonzo Button, received from Lucinda

H. Tarbell, plaintiff's testate, \$300.00, and held the same to her use until the decease of Alonzo Button; and thereafter the defendant held the same for the use of said Lucinda and subject to the writing hereinafter mentioned, until the death of said Lucinda which occurred in January, 1898. Since her death \$22.13 of interest has accrued on the \$300. This action is brought to recover the \$300 and accrued interest. The money when received by the Buttons, was deposited in their name in the Richford Savings Bank, and has since remained there. After the delivery of the money to the Buttons, Lucinda H. Tarbell executed and delivered to defendant, E. A. Button, a writing as follows: "Emeroy A. Button, September 6th, 1893. If I do not live to use my money up that I have in the bank here in Richford, and Mrs. Toof is living, I want you to give her, Emma C. Toof, one hundred dollars, and I want you to give George N. Rounds one hundred dollars, also one hundred dollars to Lou Rounds Moses." (Signed) "L. H. Tarbell."

Prior to the execution of this writing, there was nothing to prevent said Lucinda from using or disposing of this fund as she saw fit to do. If the Buttons held it in trust for her, the trust was a simple or dry trust. *Atkins v. Atkins*, 70 Vt. 567. By the execution and delivery of this writing and the holding of the money thereunder, a valid voluntary trust was created for the benefit of the persons therein named, subject to be defeated only by said Lucinda's using up the fund during her life. This she did not do. *Stone v. Hackett*, 12 Gray 227; *Davis v. Ney*, 125 Mass. 590; *Blanchard v. Sheldon*, 43 Vt. 511; *Williams v. Haskins Est.*, 66 Vt. 383; *Sargent v. Baldwin*, 60 Vt. 17; *Conn. River Savings Bank v. Albee*, 64 Vt. 571. It could not be defeated by the will of said Lucinda subsequently executed and only taking effect at her decease. The beneficiaries under the trust are entitled to the interest which has accrued since her death as well as to the \$300.

Judgment reversed and judgment for defendant, E. A. Button, to recover her costs.

REUBEN CLARK, Administrator of Sarah Clark's Estate v. E. C.
SMITH and CHAS. M. HAYS, Receivers of the Central
Vermont Railroad Company.

January Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed March 3, 1900.

Evidence—Collateral facts—Upon the question whether a train, after stopping at a particular station, was suddenly started and so handled as to give a sudden jolt to the cars, evidence of the manner in which the train had been previously handled and managed on the same trip, and of similar jolts at other stations along the route, is irrelevant.

ACTION ON THE CASE in two counts brought by Reuben Clark, Administrator of Sarah Clark's estate, to recover for an injury to his intestate which resulted in her death. One count was founded on V. S. 2447, and the other on V. S. 2451 and 2452.

Plea, general issue. Trial by jury. Bennington County, June Term, 1899, *Munson*, J., presiding. Verdict and judgment for the plaintiff. The defendants excepted.

The case, so far as it was material to the decision, is stated in the opinion.

F. C. Archibald and *Barber & Darling* for the plaintiff.

Chas. M. Wilds and *H. C. Royce* for the defendants.

TAFT, C. J. The plaintiff claimed that his intestate was a passenger on the defendant's train from Brattleboro to Londonderry; that when the train reached Jamaica, orders were given for the passengers to change cars; that the intestate arose from her seat for that purpose and stood in or near the door of the car; that the train had stopped, and was then so suddenly started and again stopped, that in consequence, she was thrown through the door to the ground and so injured that she died two days after. The testimony of all the witnesses tended to show that the train had stopped at the time of the accident; that it had

come to a standstill before the decedent started to leave the car. The testimony of the plaintiff's witnesses tended to show that the train, after stopping, was suddenly started; that as the witnesses described it, they, the trainmen, gave a "yank" to the train. One of the witnesses described it as a "jolt" and another as a slight snap, and that the train went four or five feet and then stopped. One witness said the train started and gave a sudden stop and the decedent fell out of the door. One of the witnesses testified that when the train had come to a standstill, the decedent "had got up first, and stepped over the bench and got to the door as the car gave a jolt and threw her out of the door." The testimony of the defendants tended to show that after the train came to a standstill, there was no movement of the train until after the passengers went out of the car which they intended to, and did leave, at the Jamaica station, and that the decedent fell, in attempting to go out of the car when the car was not in motion. In this situation of the case, testimony was admitted to show how the train was handled on the way from Brattleboro to Jamaica, and that the train was jerked violently at other stations, for the purpose of characterizing the way the train-men were handling the train, the management of it, and the way it was under control. The Court said, it might "be material as showing the condition of the train as affected by the running." How the train was managed at other stations had no tendency to show how it was managed at Jamaica; that it was jerked violently at other stations, had no tendency to show that when standing still at Jamaica, it was suddenly started and then stopped in the manner the plaintiff claims it was at the time of the accident, and such testimony was not relevant upon the question of the condition of the train. How it was running at other stations was collateral to the issue on trial and its admission was error. There having been error upon the trial in this respect, renders it unnecessary for us to consider the question in respect to damages.

Judgment reversed and cause remanded for a new trial.

STATE v. ROYCE A. SMITH.

January Term, 1900.

Present: TAFT, C. J., ROWELL, MUNSON, THOMPSON, START and WATSON, J.J.

Opinion filed March 3, 1900.

Keeping a dog without a license—Vicious dog—To a prosecution for keeping a dog without a license, it is no defense that the dog is vicious and cannot be licensed. It being unlawful to keep a dog without a license, and also unlawful to procure a license for a vicious dog, it follows that a vicious dog cannot be kept at all.

V. S. 4826 is not unconstitutional.

COMPLAINT under V. S. 4826, charging the respondent with keeping three dogs, more than eight weeks old, not registered, numbered, described and licensed according to law.

Franklin County, January Term, 1900, *Tyler J.*, presiding. Verdict, guilty. Judgment on verdict. The respondent excepted.

D. W. Steele, State's Attorney, and *Emmett McFeeters* for the State.

F. W. McGettrick for the respondent.

ROWELL, J. The respondent is prosecuted for keeping three dogs without a license. He proved that the dogs were vicious, and claimed that that was a defense; but the court held otherwise, and he was convicted.

The statute provides that the owner or keeper of a dog more than eight weeks old, shall annually, on or before the first day of April, cause it to be registered, numbered, described, and licensed in the office of the clerk of the town wherein the dog is kept, and shall cause it to wear a collar, distinctly marked with the owner's name and its registered number; that if the owner or keeper of a dog that is vicious or has done damage, procures a license therefor, he shall be fined twenty dollars, and that the town clerk shall not license a dog known to be vicious or to have

done damage; that a person who keeps a dog contrary to the provisions thereof, shall be fined fifteen dollars. It further provides that the chairman of the selectmen shall annually, within such a time, issue a warrant to one or more police officers or constables, directing them to proceed forthwith to kill or cause to be killed all dogs within their respective towns not licensed and collared according to its provisions, and to enter a complaint against the owners or keepers thereof; and that any person may, and every police officer and constable shall, kill or cause to be killed such dogs whenever and wherever found.

It being unlawful to keep a dog without a license, and also unlawful to procure a license for a vicious dog, it follows that a vicious dog cannot be kept at all; and this is the manifest purpose and policy of the statute. It was, therefore, no answer for the respondent to say that his dogs were vicious and could not be licensed, for he was, nevertheless, keeping them without a license, which he had no right to do, as the prohibition of the statute is general.

It is claimed, however, that the statute is unconstitutional. But that question has been so often ruled the other way that it is hardly worth while to discuss it. *Sentell v. New Orleans, etc. R. R. Co.*, 166 U. S. 698.

Judgment that there is no error, and that the respondent take nothing by his exceptions. Let sentence be imposed and execution thereof done.

STATE v. MORRIS FITZGERALD.

January Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed March 3, 1900.

Evidence—Objection too late—If a question calls for inadmissible evidence, and the answer is responsive to the question, an objection, made after the answer is given, is too late, and is unavailing.

Evidence—Unanswered question—It is immaterial whether a question is proper or improper, if it is not answered.

Evidence—Burglary—Identification of property—A witness in a burglary case having testified that before the burglary he had compared the numbers on certain watches, claimed to have been burglariously taken, with the numbers in an invoice of the same, and found them to be correctly given in the invoice, such invoice was admissible in evidence in connection with the oral testimony referring to it, upon the question of the identity of the watches claimed to have been so taken with certain watches traced into the possession of the respondent and bearing the same numbers.

Evidence—Copies of lost writings—Invoices, admissible in evidence, having been found by the court to be lost, copies thereof were properly received.

Burglary—Circumstantial evidence with evidence of the corpus delicti—Evidence sufficient for submission to the jury—Evidence tending to show that certain watches claimed to have been burglariously taken were kept in a hiding-place, and that the respondent knew of their hiding-place, that shortly after the burglary he had some of the watches in his possession, and that he disposed of a part thereof at a price not more than half their market value, in connection with evidence tending to establish the *corpus delicti*, made a case proper to be submitted to the jury, and a motion to have a verdict directed in the respondent's favor was properly overruled.

Evidence—Possession of stolen property to be considered with other relevant facts—The recent unexplained possession of stolen property, when that fact is shown, and all the attending circumstances and other relevant facts in evidence, must be considered together by the jury in determining the guilt or innocence of a respondent charged with the felonious taking of the stolen property ; and a charge which permits them to

determine the question upon the evidence of such possession, considered apart from the evidence of such circumstances and facts, is erroneous.

Evidence of good character—Evidence of good character tends to rebut the presumption of guilt consequent upon the recent possession of stolen goods.

Evidence—Circumstances attending possession of stolen property—The manner in which one keeps, uses and exhibits stolen property in his possession, has a bearing upon the effect to be given to its possession.

Inconsistent instructions—Error in one part of a charge is not cured by a proper instruction on the same subject in a later part of the charge, when the later instruction is not given to supersede or correct the former, and the jury are, in effect, left to follow either.

Evidence—Connected facts—Evidence of the recent possession by a respondent of a part of the property stolen at a certain time and place tends to connect him with the theft of other property stolen at the same time and place.

INDIOTMENT for burglary including larceny. Bennington County, June Term, 1899, *Munson*, J., presiding. Trial by jury. Verdict, guilty. Judgment on verdict. The respondent excepted.

The case is stated in the opinion.

Edward L. Bates, State's Attorney, for the State.

W. B. Sheldon for the respondent.

WATSON, J. The respondent was indicted and tried for burglarizing the store of Frank Huling, and for the larceny of seventeen watches therein being, of the property of Huling. Huling was a witness in behalf of the State, and testified in substance, that some of these watches were old ones for which he had traded, and some of them were new ones purchased by him of Bogle Brothers of White River Junction, and that when he purchased them, he received from Bogle Brothers, bills with the numbers of the watches purchased thereon, which he afterwards compared with the numbers on the watches and found to be correct; that after the burglary, he copied the numbers of the watches from some of these bills and gave a copy to the

officer to aid him in looking after the stolen property and in identifying the same. The copied list was in court, and Huling was asked by the State whether the numbers upon that paper or list were the same that he found upon the bills which he had with the watches, to which he answered, "Yes, Sir, all but one. There is one there that I am mistaken in." The respondent made no objection until after the answer was given, and the question and answer were allowed to stand subject to exception. The answer was responsive to the question; and the objection and the exception were too late, and are unavailing. *State v. Ward*, 61 Vt. 153.

John Nash, the officer to whom the copied list was furnished by Huling, was improved by the State as a witness, and after testifying to the description and numbers of the watches found by him, was asked how the description and the numbers he had given compared with the list furnished him by Huling before he recovered possession of the watches. To the ruling that this might be shown, respondent excepted. But it does not appear by the record that the question was answered, and therefore whether it was proper or otherwise, is immaterial, as the respondent was not prejudiced thereby. *Smith v. The Niagara Fire Ins. Co.*, 60 Vt. 682.

M. C. Holt, an employee of Huling, who had charge of the store for a long time before and at the time it was burglarized, was a witness in behalf of the State, and produced a bill of two of the watches in question from Bogle Brothers to Huling. This bill contained the numbers of those two watches and was properly admitted in evidence in connection with the testimony of the witness, upon the question of identification of the watches traced into the respondent's possession shortly after the burglary, as property stolen from Huling's store at that time.

The bills of some of the other new watches were found, by the court, to be lost, and the copies thereof, testified to by Huling and used by the officer, were properly admitted as secondary evidence in connection with the testimony of the witness upon

the same question. The evidence tended to show that these watches were kept in a show case in the store, and each night, were taken therefrom and put into a box under the counter to remain till morning as a hiding place, in case any one should break and enter the store in the night-time with intent to steal, and that the respondent had been in the employ of Huling, slept over the store, and had seen the watches thus hid away on different occasions, by reason whereof he had knowledge of where they were on the night in question; and that shortly after the burglary, he had in his possession some of the stolen property, and disposed of a part thereof at an unreasonably low price—not more than half its market value. This evidence with the evidence introduced tending to establish the *corpus delicti*, made a case proper to be submitted to the jury, and in overruling the respondent's motion for a verdict, there was no error. Wills' Cir. Ev. 162, 163.

In the fore part of the charge, the court instructed the jury at different times, in substance, that the whole evidence, which connected the respondent with the breaking and entering, rested upon the fact of certain personal property that was alleged to have been in the store, being found in his possession. Later in the charge the court said: "As I have before stated, the whole matter here stands upon the possession of this property; the unexplained possession of the stolen property within a short time after the theft, is evidence sufficient to convict a person of the crime by which that property came into his possession, if it produces upon your mind such an effect as enables you to feel sure, beyond a reasonable doubt, that the respondent is guilty of the offense charged." To this the respondent excepted.

The evidence tended to show that shortly after the burglary the respondent openly, in the hotel at North Hoosick, N. Y., sold two of the nickel watches in question to the proprietor of the house, and that, at the same time, the respondent had and exhibited a gold watch of the same lot, and that he subsequently remained about there—just across the street from the hotel—openly

for some time and without apparently trying to hide himself; that he gave one of the watches to the witness Hathaway for carrying him—respondent—from Hoosick Junction to Eagle Bridge, and that, at the same time, the respondent exhibited two or three watches; that the watch given to the witness for that purpose was an old one of little value. So far as the evidence discloses, this transaction was open with no apparent purpose of secreting or hiding anything. There was also evidence in the case, of more or less force, tending to show the respondent's previous good character. These were circumstances weighing in the respondent's favor. Mr. Bishop says: "The manner in which the defendant used the thing—as whether openly or not—is material to the effect of the possession." 2 Bish. Cr. Proc. sec. 746; *Wafford v. State*, 44 Tex. 439; *Minor v. State*, 56 Ga. 630.

As to the force of good character, Mr. Wills says: "Good character has a very important bearing in rebutting the presumption of guilt consequent on possession. And, in some cases, may be sufficient to entirely overcome the presumption." Wills' Cir. Ev. 87.

It was the duty of the court to submit the case to the jury in a manner to require a consideration of not only the fact of the respondent's recent possession of a part of the stolen property, if that fact was established, but also a consideration of all the circumstances for and against him, and on the whole, say whether they were satisfied of his guilt beyond a reasonable doubt. Mr. Bishop further says: "All the attending circumstances should be shown in connection with the fact of possession. And all should be taken into the account by the jury." 2 Bish. Cr. Proc. sec. 745.

Mr. Wills further says: "It is always a question for the jury, applying to the solution of the problem the common experiences and observations of life, whether they are satisfied, from all attending circumstances and other facts in evidence, that the possession was honest or felonious." Wills' Cir. Ev. 82.

Under this instruction of the court, the jury were at liberty to consider and determine the question of guilt upon the recent

unexplained possession of a part of the stolen property, alone, and to convict the respondent if they were thereby satisfied of his guilt beyond a reasonable doubt. A conviction founded upon such a basis wholly deprived the respondent of the benefit of the attending circumstances in his favor, and also, of the evidence of good character. This part of the charge was too narrow and was error. *Brooks v. Thatcher*, 49 Vt. 492.

Nor was this error rectified by giving the proper instruction upon the same subject in a later paragraph of the charge. The latter was not given to correct or supersede the former instruction, and was inconsistent therewith. The jury were left to adopt either, and it cannot be said that no harm resulted to the respondent therefrom. *Bovee v. Danville*, 53 Vt. 183.

The evidence tended to show that some of the watches produced on the trial, were found in the hands of one Delaney, in the State of New York, and that they were a part of the watches stolen at the time of the alleged burglary. Delaney was not produced as a witness, and there was no direct evidence as to how he came in possession of the watches, nor connecting the respondent therewith. Relative thereto, the court charged the jury, in substance, that there being evidence tending to show a certain number of watches were taken on the same night, and that a portion of them were in the recent possession of the respondent, there was evidence tending to connect him with the other watches lost or taken at the same time. To this respondent excepted. We think those facts and circumstances had the evidentiary force given them by the court, and the charge in that regard was without error. *Commonwealth v. McGarty*, 114 Mass. 299.

Exceptions sustained, judgment reversed, verdict set aside, and cause remanded.

ALFRED RIOUX v. THE RYEGATE BRICK CO.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and
WATSON, JJ.

Opinion filed March 3, 1900.

*Construction of contracts—Substance as distinguished from mere form—*The substance of a contract as distinguished from its mere form must be considered when it is necessary so to do in order to ascertain the substantial intent of the parties.

*Construction of contracts—Substantial intent controls—*In the construction of a contract the substantial intent of the parties is the controlling consideration to which greater regard is to be had than to the precise words used.

*Construction of contracts—Circumstances in which parties contract to be considered—Fair and just construction favored—*In the construction of a contract the circumstances in which the parties contract are to be looked at; and a construction will never be adopted that will give one party an unfair advantage over the other, unless such was their manifest intention when the contract was made.

*Construction of contracts—Duty imposed by necessary implication—Implied covenants and promises—*A duty may be imposed upon a party to a contract by necessary implication; and when such implication is not external to the contract, but gathered from it, it is as much a part of the contract as if set forth in express words. Such implication is but an application of the doctrine of implied covenants and promises.

*Application of the foregoing principles of construction—*By the terms of a contract by which the plaintiff was to make for the defendants, in their brickyard, a million brick a year for five years, and as many more as the defendants wanted, the defendants "had the privilege of furnishing" supplies, and the plaintiff was to be paid for all brick sold each month, on the 15th of the following month. It being established that the plaintiff's only means of carrying on the contract was what he received under it, and that this was known to the defendants at the time of the contract, it must be taken that it was the mutual intention of the parties that the plaintiff should receive from that source enough to enable him to prosecute the work. Neither party could have intended less, for otherwise, as they knew, the purpose of both was sure to be defeated.

Same—In the circumstances, the law construes the contract in this case as imposing upon the defendants by necessary implication the duty of furnishing supplies or of selling and paying for brick, or of doing both, so as to enable the plaintiff to go on with the work.

Construction of contract in respect to payment after sale—Reasonable time in which to sell—Under the contract, the obligation to pay for brick made was not wholly contingent upon the actual sale of the brick. They were to pay on the 15th of the month following a sale; and after the lapse of a reasonable time in which to sell, they were bound to pay whether they had sold or not.

Reasonable time dependent upon circumstances—How determined in this case—What is a reasonable time depends on the circumstances of the particular case, and in this case a reasonable time was a time seasonable to meet the necessities of the plaintiff, and to enable him to prosecute the work.

Breach of contract which goes to its essence—External condition subsequent—Discharge of injured party—Under the contract in this case the defendants after furnishing supplies and paying help for some months, refused to furnish further supplies and neglected to sell, or pay for, brick made, and so, committed a breach which went to the essence of the contract, operated as an external condition subsequent, and entitled the plaintiff to be discharged from further performance on his part.

Breach of contract not going to its essence—Breach compensable in damages—The plaintiff, before the breach by the defendants, purchased certain supplies of another than the defendant; but such purchase, if a breach at all, did not go to the essence of the contract, was compensable in damages, and does not defeat recovery. As the plaintiff performed in part substantially according to the terms of the contract, he is entitled to recover compensation for what he did thereunder.

Finding supported by evidence—The finding of the referee, that the defendants knew the financial condition of the plaintiff at the time the contract was made, is supported by the evidence reviewed in the opinion.

Practice—A concession, made by a party on trial, may properly be taken to be based on knowledge of the conceded fact.

ACTION OF ASSUMPSIT against Martin H. Gibson and John Gibson, partners under the firm name of the Ryegate Brick Company. Caledonia County, June Term, 1899, *Watson, J.*, presiding. Heard on referee's report and exceptions thereto. Judgment *pro forma* for the plaintiff to recover \$2441.03 and interest from November 15, 1894, with costs. The defendants excepted.

The case is stated in the opinion.

E. W. Smith and *Scott Sloane* for the plaintiff.

Dunnett & Slack for the defendants.

ROWELL, J. By the contract in question, made and executed the 2d of March, 1894, the plaintiff was to furnish help, horses, and every thing else required to carry on the brick business that the defendants were not to furnish, and make for the defendants in their brick-yard, shaving the clay for that purpose, a million brick a year for five years, and as many more as the defendants wanted, at so much a thousand, packed on the cars. The defendants had "the privilege of furnishing" the plaintiff hay, provisions, and groceries, the price not to exceed what he would have to pay for the same grade of goods elsewhere; and all brick sold each month were to be paid for on the 15th of the following month.

The referee finds that at the time the contract was made, the plaintiff was a poor man, without the money, property, or credit necessary to employ and board the men and teams necessary to carry out the contract, and continued in the same financial condition up to the time this suit was commenced, which was known to the defendants when the contract was made and when they refused to furnish supplies as below stated. The finding that the defendants knew the plaintiff's financial condition at the time the contract was made, is challenged as not supported by the evidence. But we think it a warrantable deduction from what the referee says he based it upon.

The defendants saw the plaintiff in Gonic, N. H., where he lived, and there commenced negotiations with him; and the fact that as soon as he moved to Ryegate, which was the 3d of April, and before he could have done any work under the contract, the defendants, without, as far as appears, having learned anything new about him, and, as it were, as matter of course, began to furnish on credit all the provisions and supplies for his family, including his employees, and to pay his men, as the referee finds

they did, affords, of itself, pretty good ground for saying that they knew from the first that they would have to do that in order to enable him to go on with the contract. And besides, their concession on trial that he had no money or property to carry on the contract except what he was entitled to receive thereunder from them, being unlimited as to time, and coupled with the fact that they did not claim by their testimony that they supposed otherwise when the contract was made, is capable of being construed to mean, and probably does mean, that he had no other means at any time, neither when the contract was made nor afterwards; and as the concession may properly be taken to have been based on knowledge, the referee might well have inferred that the knowledge and the concession were coextensive in point of time.

The defendants continued to furnish supplies and to pay help to and including September 15th, and refused to do either thereafter. Up to this time the plaintiff had burned three kilns of brick, one in June and two in August, which produced, allowing the kilns to be alike, 1,162,500 brick, such as the contract called for; and on the 3d of September, he had, moulded, dried, and hicked in the yard, enough for another kiln, a part of which, at least, he packed in the kiln after September 15th, and the kiln was burned the latter part of October. The plaintiff made 1,500,000 brick in all, such as the contract called for, which the defendants have sold and received pay for; but at the time suit was commenced, November 15, 1894, the defendants had sold less than half a million, leaving more than a million in the yard unsold; and those sold, with certain other items allowed the plaintiff, made his credit at that time, as the judgment was made up, \$1904.41, and the defendants had paid him \$2638.86, thus largely overpaying him on that basis; but the labor for making the brick left in the yard unsold came to \$3173.48 more, as allowed by the referee, and those brick were sold mostly in 1895 and 1896, and before the 15th of September of the latter year.

Soon after the plaintiff commenced making brick, the defendants told him they could and would sell all he could make, and wanted him to make more than a million that season. Relying upon this, he employed more men, and made more brick than he otherwise would, fully believing that the brick so made would be sold mostly that summer and fall, and the rest of them by the time brick-making would commence in the spring.

On September 15th, when the defendants refused to make further advances, there were about 750,000 brick in the yard that the plaintiff had made, and he then notified them that he had nothing to eat, no money to buy provisions, none to pay his help, and must work somewhere to get something to live on unless they would continue to furnish supplies to enable him to go on with the contract. The defendants refused to furnish him, and claimed as an excuse, as the referee says, (1) that they were not obliged to do so under the contract; (2) that he had broken the contract by not shaving the clay; (3) that they had already advanced more than was due him under the contract; and (4) that they had advanced to him more than all the brick then manufactured by him would come to at the prices named in the contract.

The plaintiff plowed and picked most of the clay instead of shaving it, as the contract required. But the referee finds that the brick were just as good with the clay plowed and picked as they would have been with it shaved, and that the defendants consented to its being plowed and picked.

In November, shortly before suit was commenced, the plaintiff requested the defendants to furnish cars so that he could load brick and get some pay, or else to furnish supplies. In response to this, they furnished one car only, which was loaded with 10,200 brick on November 12th, which were credited to him; but they made no other advances.

The plaintiff claims that the refusal of the defendants on September 15th to make further advances, was a breach of the contract on their part, and that he was thereby both disabled

and discharged from further performance on his part. That he was thereby disabled, clearly appears; and the question is, whether he was thereby discharged.

The defendants say that they were not obliged by the contract to furnish supplies, but could furnish them or not at their option, and were not in fault in not selling more brick and thereby supplying the plaintiff with means, and therefore committed no breach.

This makes it necessary to consider the substance of the contract as distinguished from its mere form, that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the controlling consideration in construing agreements, and to which greater regard is to be had than to the precise words used. *Ford v. Buch*, 11 Q. B. 869. And the circumstances in which parties contract are to be looked at; and a construction will never be adopted that will give one party an unfair advantage over the other, unless such was their manifest intention when the contract was made. *Russell v. Allerton*, 108 N. Y. 288.

It being established that the plaintiff's only means of carrying on the contract was what he received under it, and that this was known to the defendants at the time the contract was made, it must be taken to have been the mutual intention of the parties that he should receive from that source enough to keep him going. Neither party could have intended less, for otherwise, as they knew, the purpose of both was sure to be defeated.

There were two ways under the contract, and only two, in which this intention could be carried out. One was, for the defendants to furnish supplies; the other was, for them to sell brick and pay. The first was the only way open until brick were made that could be sold, and then both ways were open.

In these circumstances, the law supposes it to have been the intention of the parties that the defendants, in one or the other or both of those ways, should do whatever was necessary to be done in order to provide the plaintiff with the means necessary

to enable him to go on with the work ; and it construes the contract as imposing that duty upon them by necessary implication. This is but an application of the doctrine of implied covenants and promises. Thus, in *United States v. Speed*, 8 Wall. at page 84, it is said by Mr. Justice Miller, speaking for the court, that when, as there, the obligation of the plaintiff required an expenditure of a large sum in preparation to enable him to perform it, and a continuous readiness to perform, the law implies a duty on the other party to do whatever is necessary for him to do to enable the plaintiff to comply with the promise or covenant. But there the contract contained an express promise that the defendant should furnish what was necessary. Such an implication, when not external to the contract, but gathered from it, as it is in the case at bar, is as much a part of the contract as if set forth in express words. Harriman, Cont. 152.

But if we take another view, and put the case on the ground of allowing the defendants a reasonable time in which to sell brick, we come to the same result ; for what is a reasonable time depends on the circumstances of the particular case, and here the circumstances were such that a reasonable time was inevitably a time seasonable to meet the necessities of the plaintiff and to enable him to prosecute the work ; and when the defendants refused to furnish supplies, there then being plenty of brick in the yard unsold, the time for selling them had arrived, as that was the only way left by which the plaintiff could obtain the necessary means, and therefore it then became and was the duty of the defendants to adopt that way if they would not continue the other ; but they did neither.

It cannot be said that their obligation to pay was wholly contingent on the actual sale of the brick. They were to pay on the 15th of the month following a sale ; and after the lapse of a reasonable time in which to sell, they were bound to pay whether they had sold or not. Thus, in *Nunez v. Dautel*, 19 Wall. 560, the debtor promised to pay as soon as he sold a certain crop or otherwise raised the money ; and it was held that he was bound

to pay after the lapse of a reasonable time, whether he had sold the crop or otherwise raised the money or not.

But the defendants say that if they were bound to furnish supplies they had a right to furnish all of them, and that the plaintiff's purchase of some of Beattie was a breach on his part. It appears that during the summer the plaintiff bought more or less goods of Beattie, and on the 14th of September assigned to Beattie on account thereof what was due or to become due to him from the defendants to the amount of \$190. But the defendants refused to recognize the assignment, and have never paid anything upon it.

The goods that plaintiff bought were necessary supplies, required and used by him in boarding his family and the men employed in making brick, and were very largely such as the defendants did not have in stock when wanted by him. But this, if a breach at all, did not go to the essence of the contract, and was compensable in damages, and so will not defeat recovery. 7 Am. & Eng. Ency. Law, 153; Benjamin's Princip. Cont. 139-40; *Noland v. Whitney*, 88 N. Y. 648.

But as the defendants' breach went to the essence of the contract, it operated as an external condition subsequent, and entitled the plaintiff to be discharged from further performance on his part; and as he has performed in part substantially according to the terms of the contract, he is entitled to recover compensation for what he did thereunder. *Chamberlin v. Scott*, 33 Vt. 80; *Chicago v. Tilley*, 103 U. S. 146.

These views being decisive, no other questions need be considered.

As it is not suggested but that the judgment below is correct in amount if any is to be rendered for the plaintiff, that

Judgment is affirmed, and judgment rendered for the amount thereof, with interest thereon during stay of execution, and additional costs.

D. F. HOLDEN v. THE RUTLAND RAILROAD CO.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed March 3, 1900.

Railroads—Delivery of improper ticket by agent—Denial of purchaser's right to transportation—Action on the case—If a railroad company, through the negligence of its ticket agent, and without fault on the part of the purchaser of a ticket, delivers to such purchaser a ticket on which is written a name other than that of the purchaser, so as to indicate that the purchaser is not entitled to the transportation thereon for which he contracts and pays, and the company thereafter, through its conductor, refuses to accept such ticket in payment of such transportation, it is guilty of a breach of duty towards the purchaser for which he can maintain an action on the case.

Right to nominal damages—Demurrer—If such breach of duty is shown in such action, the plaintiff is entitled to nominal damages at least, and, therefore, a demurrer cannot be sustained on the ground that the allegations of the declaration do not show any damages to the plaintiff for which he can sustain the action.

The rule applicable to the form of action—The rule is recognized and applied that when from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, then, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach.

CASE FOR NEGLIGENCE. Heard on demurrer to the declaration. Caledonia County, June Term, 1899, *Thompson, J.*, presiding. Demurrer sustained *pro forma* and without hearing. Declaration adjudged insufficient and judgment for the defendant. The plaintiff excepted.

The case is stated in the opinion.

Edward H. Deavitt for the plaintiff.

Frederick H. Button for the defendant.

THOMPSON, J. The declaration alleges that the plaintiff applied to the defendant's ticket agent at Burlington, Vt., for such a ticket as would entitle the plaintiff to be transported by the defendant over its railroad the distance of one thousand miles, and that he paid twenty dollars for such a ticket, and thereupon received from said agent a ticket which he represented to the plaintiff entitled him to be so carried over the defendant's railroad; that in writing on said ticket the name of the person entitled to use it, said agent carelessly and negligently, and without the fault of the plaintiff, wrote thereon the name of A. F. Holden, instead of D. F. Holden, the name of the plaintiff; that thereafterwards, while there were still attached to said ticket, coupons representing more than sixty-seven miles, the distance between Burlington and Rutland, the defendant received the plaintiff as a passenger upon its train to transport him from Burlington to Rutland, and that while he was being so transported the defendant refused, by its conductor, to receive said ticket in payment of plaintiff's fare. Other facts are set forth, and other wrongs and injuries are alleged in the declaration, which it is not necessary for us to consider under the defendant's general demurrer. There is an allegation that all the wrongs and injuries set forth were the direct result of said carelessness and negligence of said agent, and without lack of due care on part of the plaintiff.

The plaintiff was entitled to transportation on the ticket for which he contracted and paid, and is entitled to at least nominal damages for the neglect and refusal of the defendant to so transport him. It is not necessary to decide, and it is not adjudged whether he is entitled to recover for other damages under his declaration. As he is entitled to nominal damages at least, the demurrer cannot be sustained on the ground that the allegations of the declaration do not show any damages to the plaintiff for which he can sustain an action.

The defendant contends that the plaintiff has mistaken the form of his action, and that it should have been assumpsit instead of case. Without doubt he could maintain an action of assumpsit on a promise implied by law from the facts stated in his declaration, but that is not decisive of his right to maintain an action on the case. In 1 Chitty's Pl. (14th Am. Ed.) 135*, the rule is stated to be this: "Where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach." *Burnett v. Lynch*, 5 Barn. & C. 609. It was the duty of the defendant, under the facts stated in the declaration, to deliver to the plaintiff such a ticket as would entitle him to the transportation on its railroad for which he paid, and upon presentation of such ticket to transport him on proper trains until it was used up. For the breach of this duty, arising from the negligence of the defendant's agents, which in law is its negligence, the plaintiff can maintain an action on the case for the damages accruing to him from such breach of duty.

The pro forma judgment sustaining the demurrer and adjudging the declaration insufficient and for the defendant to recover its costs, is reversed, and the demurrer is overruled and the declaration is adjudged sufficient, and cause remanded.

SYLVIA A. CLEMENT v. AARON SKINNER AND TRUSTEES.

October Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed March 3, 1900.

Contract to marry—Time of performance—A contract to marry, unconditional as to time, is in contemplation of law a contract to marry within a reasonable time.

Contract to marry—Effect of subsequent agreement as to time—In the case of such a contract to marry, a subsequent agreement as to the date of the marriage is not the formation of a new contract, nor the abandonment of the existing one, but is a recognition of the subsisting contract, and is an act of the parties which is evidence of what is a reasonable time.

Contract to marry—Modification as to time—If a contract to marry within a fixed time, is indefinitely extended as to time, it then becomes a contract to be performed within a reasonable time.

Declaration upon a contract—Sufficient to state legal effect—In declaring upon a contract it is not necessary nor proper to set forth the various steps which led up to it, nor is it necessary to set forth its identical language. It is sufficient if its legal effect is stated.

Variance—Under the foregoing principles of law, there was in this case no variance between the contract to marry declared on and the contract which, in either of two aspects, the plaintiff's evidence tended to show.

Evidence—Presumption that language is understood according to its plain import—The defendant was permitted to testify that in negotiations which induced an offer of marriage from him to the plaintiff, the plaintiff told him that she owned a stock of goods worth \$1800, and owed only \$400, and that he believed and acted upon such statement. He then offered, and was refused permission, to testify that from what the plaintiff so told him he understood that she owned a stock of goods worth \$1800, and owed only \$400. As the language used by the plaintiff, as testified to by the defendant, meant precisely what he offered to show he understood it to mean, and could mean nothing else, he is presumed to have understood it according to its plain, natural and only meaning, and there was no error in excluding evidence of his understanding.

Practice—Error in reception of evidence cured by charge—Upon the question of damages, evidence was received that while a contract to marry was in force between the parties, the plaintiff, a milliner, sold a part of her stock of goods at a sacrifice in order to be ready to marry, and that the

defendant knew of such sale and sacrifice. This was error, but, when the case was submitted to the jury, this evidence was withdrawn from their consideration upon the question of damages, and was left for their consideration only upon a question to which it was relevant. The error in admitting it for an improper purpose was thus cured, it not appearing that the defendant was surprised or misled in his defence by the action of the trial court.

SPECIAL ASSUMPSIT on a contract to marry. Plea, general issue. Trial by jury. Orleans County, March Term, 1899, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The case is stated in the opinion.

W. W. Miles for the plaintiff.

Young & Young and *B. F. D. Carpenter* for the defendant.

THOMPSON, J. I. The defendant claimed that there was a variance between plaintiff's evidence and her declaration, in that the latter alleged a promise to marry in a reasonable time, while her evidence showed that the promise was to marry when she had disposed of her stock of millinery goods. The plaintiff's evidence tended to prove that the defendant made her an offer of marriage, which she accepted, and that subsequent to her acceptance, it was talked over and settled between them that their marriage should take place as soon as she could dispose of her stock of goods. This leaves it, that the promise to marry when made, was unconditional as to time, and consequently the law fixed the time, which was a reasonable time. If there was an after understanding, that the date of the marriage should be as claimed by the plaintiff, that would not make a new contract. It would be entirely consistent with the subsisting contract and recognize its existence. In case of a contract between parties to do a certain act within a reasonable time, a subsequent understanding between them, that the act shall be done at a particular time, would not constitute an abandonment of the contract and the formation of another. Such an agreement would be an act of the parties, which would be evidence of what would be a reasonable time.

Clark v. Pendleton, 20 Conn. 505. Such was the effect of the understanding between plaintiff and defendant, if there was one as claimed by plaintiff, in respect to the true time when they should be married. Hence the court below correctly held that there was no variance as to this phase of the case.

II. The defendant's evidence tended to prove that by the terms of the contract, the plaintiff was to marry him in two or three weeks at most, from the date of their engagement. The plaintiff denied this, but her evidence tended to prove that if this claim of the defendant was correct he had waived the limitation as to time, and affirmed the contract so that it existed without any limitation by its terms in respect to time of performance. The court in substance instructed the jury that if the contract was as claimed by the defendant as to time, and he extended the time and kept the contract in force, the plaintiff could recover. To this, the defendant excepted on the ground that such new contract was not declared upon, and that it was a variance from the cause of action set out in the declaration. Assuming that the original contract in respect to time, was as claimed by defendant, and that it was indefinitely extended in respect to time of performance, as plaintiff's evidence tended to show, it then became a contract to be performed within a reasonable time, and this would be the contract upon which the plaintiff must recover, if at all. *Dana & Henry v. Hancock*, 30 Vt. 616. There is no variance between such a contract and the one described in the declaration. In declaring upon a contract it is not necessary nor proper to set forth the various steps which led up to it, nor is it necessary to set forth its identical language. It is sufficient if its legal effect is stated. This was done by this declaration and the charge was correct.

III. The defendant was permitted to show that in the negotiations which induced his offer of marriage to the plaintiff, she told him she owned a stock of goods worth about \$1800 and owed only \$400, and that he believed what she said on this sub-

ject and acted on it. The evidence tended to show that she owed more than \$400 at the time she told him that was all she owed. The defendant excepted to the ruling of the court refusing to permit him to testify that he *understood* from what she told him that she owned her stock of goods to the amount of \$1800, and owed only the sum of \$400. If the plaintiff said to the defendant what he claimed she said on this subject, it was in response to his questions, and her answers were direct and susceptible of only one meaning, viz., that she owned about \$1800 worth of goods and owed only \$400. Standing thus, it was not error not to permit defendant to state what he understood from what she said on this subject. The language used by plaintiff, if as claimed by the defendant, meant precisely what he offered to show he understood it meant, and could mean nothing else. He must be presumed to have understood it according to its plain, natural, and only meaning. There was no offer to show that he understood it in any other sense. The ruling of the court permitting him to show what the plaintiff said, and that he believed and acted upon it, gave him the full benefit of this branch of his defense.

IV. Subject to the objection and exception of the defendant, the plaintiff was permitted to show that while the contract to marry was in force, she sold a part of her stock of goods at a sacrifice of several hundred dollars, in order to be ready to marry the defendant, and that he knew of such sale and sacrifice at the time the same occurred.

When the evidence was received, it was admitted on the question of damages. When the case was submitted to the jury, it was withdrawn from their consideration on that branch of the case, and the jury were instructed that the plaintiff could not recover for such loss. But on the question of whether the defendant acquiesced in a postponement of the time in which the marriage contract was to be performed, the jury among other things, were instructed in substance, that they might consider this claim of the plaintiff, that she thus sold her goods at a sacrifice, and

that the same was known to him, and that he then made no claim that he did not consider the contract binding. This testimony was inadmissible on the question of damages as the case stood, but was relevant to the issue to which it was applied in the charge. The trial court could direct it to be used for a legitimate purpose although it would have been error to have used it for the purpose to which it was limited when admitted. The error in admitting it for an improper purpose, was cured by the action of the trial court, when it submitted the case to the jury. The defendant took no exception to the charge on this subject and it cannot be presumed that he was surprised or misled in his defense by the action of the trial court.

Judgment affirmed, and cause remanded to County Court to be proceeded with as to trustees.

I. H. P. ROWELL v. ESTATE OF W. C. LEWIS.

October Term, 1899.

Present: TAFT, C. J., ROWELL, MUNSON, THOMPSON, and WATSON, JJ.

Opinion filed March 3, 1900.

Statute of limitations—New promise—"I will pay this note at any time," endorsed on a note and signed and dated by the payor, is not a waiver of the statute of limitations, but is a new promise.

Statute of limitations—Acknowledgment of debt—"Good at any time," endorsed on a note and signed and dated by the payor, is not a waiver of the statute of limitations, but is merely an acknowledgment of the debt evidenced by the note, from which a promise to pay may be implied.

Construction of such endorsement—Principles applicable—The presumption is that in making such endorsements the payor uses words in their primary and usual sense in endorsements upon notes. The language must be construed as the payee has a right to understand it, or as the payor expects him to understand it.

Interpretation for the court—The meaning and effect of such endorsements is for the court and not for the jury to determine.

Statute of limitations—Effect of acknowledgment or new promise—The liability arising from an acknowledgment or a new promise is as limited as the liability under the original contract on which it is based, and is effective in avoiding the bar of the statute of limitations only for a like length of time.

Sale of merchandise to be applied on note—Application made by law—In case merchandise is sold and delivered to apply on an indebtedness of the vendor to the vendee, it is as though the selling price thereof had been paid in money, and the law makes the application at once in extinguishment of the indebtedness *pro tanto*.

Statute of limitations—Time of payment, not time of endorsement, material—The time when payments so made, and applied by the law, are in fact endorsed on the writings evidencing the indebtedness is immaterial in respect to the operation of the statute of limitations.

Payment to apply upon an indebtedness consisting of several debts—When an indebtedness consisted of two notes and an account, of different dates, and a payment was made upon the indebtedness, its application, by the endorsement of the creditor, in such manner as to keep all these debts alive, was proper.

Question improperly submitted to the jury—Under such circumstances it was error to leave it to the jury to say whether the creditor was warranted in making such application on the indebtedness, or whether he ought not to have applied the whole payment upon the first debt, and to instruct the jury that there was a presumption in the nature of evidence that the debtor would desire to have the application so made.

APPEAL from the judgment of commissioners on the estate of W. C. Lewis. The plaintiff declared specially on two promissory notes and in general assumpsit. Pleas, the general issue, payment, the statute of limitations and offset. Trial by jury, Washington County, September Term, 1897, *Tyler, J.*, presiding. Verdict and judgment for the plaintiff. The plaintiff excepted.

The verdict and judgment were for the amount of the note dated September 14, 1861, described in the opinion, less the amount of all the payments made on the entire indebtedness as therein stated.

T. R. Gordon and J. W. Gordon for the plaintiff.

Dillingham, Huse & Howland and *Geo. W. Wing* for the defendant.

WATSON, J. The plaintiff seeks to recover the amount due upon two promissory notes, one dated September 14, 1861, for twenty dollars, payable to the plaintiff or order, on demand with interest annually, and signed by the intestate, and the other dated August 26, 1867, for two hundred forty-eight and 25-100 dollars, payable to the plaintiff or bearer on demand, with interest annually, and signed by the intestate with the firm name of D. & W. C. Lewis, of which firm he was a member, and upon an account, of two items dated in 1861, upon a small piece of paper claimed by the plaintiff to contain the original charges, on which is endorsed a payment of coal under date of March 16, 1891.

On the former note is the endorsement, "I will pay this note at any time. W. C. Lewis, June 13, 1873;" and under date of September 22, 1891, is endorsed a payment of coal amounting to \$20.28. On the latter note is the endorsement, "Good at any time, W. C. Lewis, Aug. 27, 1873;" also endorsements of coal, with number of pounds and value, under dates of October 9, 1890, November 8, 1892, and February 18, 1893.

At the close of the evidence the plaintiff requested the court to hold, as a matter of law, that the endorsements, "I will pay this note at any time," on one note, and, "Good at any time," on the other, signed by the intestate, each constituted a waiver of the statute of limitations. The court refused so to hold, but held, as a matter of law, that these endorsements were severally, at most, a promise to pay at any time within six years from the date of the endorsement, to which the plaintiff excepted. The plaintiff also requested that, in case his former request was not granted, the question should be submitted to the jury as a question of fact. This the court declined to do, and the plaintiff excepted.

The endorsement, "I will pay this note at any time," is, in terms, a promise to pay the note on which it is written; and the

endorsement, "Good at any time," giving it its greatest force as regards the statute of limitations, was but an acknowledgment of the debt evidenced by the note on which it appears, from which a promise to pay might be implied; but neither was a promise to waive the statute, and the plaintiff was not warranted in giving such construction. The presumption is that the intestate, in making these endorsements, used the words in their primary and usual sense when taken in connection with the notes on which they were written, and there is nothing in the case indicating that he expected them to be differently understood by the plaintiff. The language must be construed as the plaintiff had a right to understand it, or as the intestate expected him to understand it. *Gunnison v. Bancroft*, 11 Vt. 490. The liability arising from an acknowledgment or new promise is as limited as the liability under the original contract on which it is based, and is effective in avoiding the bar of the statute of limitations only for a like length of time. *Munson v. Rice*, 18 Vt. 53. The requests were properly refused, and the holding of the court was as favorable to the plaintiff as the law would permit.

The coal endorsed on the notes and account was sold and delivered by the intestate to the plaintiff, as the evidence of the latter tended to show, to apply on the intestate's *indebtedness* to the plaintiff. The fair inference to be drawn from the record is that this evidence was not controverted by the defendant, and we so construe it.

The indebtedness of the intestate to the plaintiff was represented by the two notes and the account combined, and if the coal was sold and delivered to apply in payment thereon, it was the same as though the selling price thereof had been paid in money for that purpose at the time of each sale, and the law made the applications at once in extinguishment of that indebtedness *pro tanto*. *Farrington v. Jennison*, 67 Vt. 569; *Lyon v. Witters*, 65 Vt. 396. And these payments thus applied by the law, if made without protest as to further liability, operated to remove the statute bar at the times they were made, regardless

of the time when, in fact, they were endorsed in writing on the notes and account. *Lincoln v. Johnson*, 43 Vt. 74; *Hayes v. Morse*, 8 Vt. 316; *Sanborn v. Cole*, 63 Vt. 590. The endorsements in fact, as made by the plaintiff on July 6, 1895, were not improper. Such endorsements were consistent with the purposes for which the payments were made, and not inconsistent with the previous applications by the law. *Corliss & Way v. Grow*, 58 Vt. 703.

Instead of submitting the question as to whether the coal was in fact sold and delivered to apply in part payment upon the *indebtedness* of the intestate to the plaintiff, with instructions as to the effect thereof in law, if such fact was established, as the case upon the evidence required, the court, in those portions of the charge to which exceptions were taken, left it, in effect, to the jury to say whether, in justice to the intestate, the plaintiff was warranted in making the applications, as he did, to keep all three debts alive, or whether he ought not to have applied all the payments on the first debt and extinguished that as far as he could; and that there was a presumption that the intestate would desire to have the applications thus made, in the nature of evidence to be considered with the other evidence, by the jury, in determining this question.

The charge, in this regard, allowed the jury to determine whether the plaintiff ought not to have made applications inconsistent with the purpose of the intestate in making the payments, and letting that determination be conclusive upon the question of the statute of limitations, and was error.

Judgment reversed and cause remanded.

STATE v. JOHN POWERS.

January Term, 1900.

Present : TAFT, C. J., ROWELL, STANT, THOMPSON and WATSON, JJ.

Opinion filed March 3, 1900.

Reception of evidence—Objection after answer—When a question is answered before an objection is made, and there is nothing in the record to show that the answer was given before an objection could be interposed, an objection made and an exception taken after the answer has been given, must be taken to have been too late.

Evidence—Question construed in accordance with its substantial import—The writer of a certain book entry was shown the same and was asked, "Won't you state whether or not that bears evidence of an erasure or change?" The inquiry was, in effect, whether the entry appeared as it did when it was made by the witness, and was proper.

Documentary evidence—Book entries made in the regular course of business—Entries bearing upon the reliability of the book—In support of an alibi the respondent put in evidence certain entries from a livery book under the claim that the book was kept in the regular course of the livery business of one S. It was then proper for the State to put in evidence other entries in the same book tending to show the real character of the book as a record of the business transacted.

Documentary evidence—Impeachment of book by inspection—Objections made below alone considered—A book entry was put in evidence by the respondent to show a date material to his defense of an alibi. The State offered the whole page on which this entry was, under the claim that an inspection of the page tended to show that the entry in question had been interlined after the amounts carried out against the other entries had been footed up, and that the footing had thereafter been changed. The respondent objected solely on the ground that the person who made the entry had been improved as a witness and had not been interrogated as to the apparent interlineation and change of footing. This objection was properly overruled.

Cross-examination of witness—Questions to test accuracy—A witness having given testimony tending to show that the respondent was in New Hampshire at the time of a burglary with which he was charged, it was proper on cross-examination to elicit the fact that the first thing that called the attention of the witness to the respondent's whereabouts at the time of the burglary, was a letter from the respondent received about two months thereafter.

Cross-examination—Relations of witness and party—It is proper on cross-examination to show the acquaintance and relations of a witness with the party calling him.

Cross-examination—Showing the business of a witness—It is proper on cross-examination to show by a witness what his business is.

Evidence—Identification—Opinion evidence—When a witness positively identifies a person, it is not error to refuse to instruct the jury that such identification is a mere matter of opinion. Identification, or recognition, may be as much actual knowledge as the knowledge of any other fact arrived at through the senses.

Charge—Cautionary instructions—It is not error to refuse to instruct the jury that testimony as to identity should be subjected to the closest scrutiny. In respect to cautionary instructions the court adheres to what is decided in *Noyes, French & Fickett v. Parker*, 64 Vt. 384.

Criminal law—Definition of an alibi—An alibi is established by showing that the person charged with a crime was at some place other than that where the crime was committed, at such a time that he could not have been at the place of the crime at the time of its commission. If the accused might have been at the place claimed at the time shown, and yet have been at the place of the crime at the time of its commission, there is no alibi.

Alibi—Submission to the jury in connection with the main question—When the question of an alibi is submitted to the jury in connection with the main question of guilt or innocence there is no occasion to charge as to the measure and burden of proof applicable to an alibi considered separately.

Criminal law—Alibi—Measure of proof—Reasonable doubt—When in a criminal case there is evidence in support of an alibi, an instruction that the State must establish the guilt of the respondent beyond a reasonable doubt to entitle it to conviction, and that if the evidence in support of the alibi, in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt as to the guilt of the respondent he is entitled to an acquittal, is a correct statement of the law.

INFORMATION for burglary. Trial by jury, Franklin County, March Term, 1899, *Munson*, J., presiding. Verdict, guilty. Judgment on verdict. The respondent excepted.

The information charged the respondent with the burglary of a bank in Richford. It appeared that the bank was burglariously entered between the hours of two and three in the morning of Sunday, November 6, 1898.

The State improved two witnesses, W. F. Grennan and J. Taylor who testified that at the time of the burglary they were intercepted in front of the bank, taken inside and tied to chairs and guarded for about an hour by a party of whom the respondent was one.

The testimony introduced by the respondent tended to show he was not in Richford on the 5th or 6th of November, 1898, but that at the time of the burglary he was at West Lebanon, New Hampshire.

The witnesses, Bennett and Watson, referred to in the opinion, were among those called by the respondent in support of his defense of an alibi. The former, a livery stable keeper, was unable to fix a date material to his testimony and to the defense otherwise than by reference to an entry on page "A" of his stable book, and this entry was put in evidence in connection with his testimony.

The witness, Watson, was cross-examined as to the length of his acquaintance with the respondent and as to their business relations. He was also cross-examined as to what his own business had been at various times and places.

G. W. Steele, State's Attorney, and *Alfred A. Hall* for the State.

Farrington & Post and *F. W. McGettrick* for the respondent.

THOMPSON, J. I. The respondent was charged with the crime of burglary committed November 6, 1898. No question was made by him, but that the burglary was committed at the time and place claimed by the State. He denied having participated in it and his defense was an alibi. In support of this defense, he relied upon certain entries made in a book claimed to have been kept in connection with the livery business of D. H. Sargent at West Lebanon, N. H. These entries in connection with the testimony of one Frank Keith, a witness produced by the respondent, who claimed to have made the entries, tended to prove that the respondent was at West Lebanon at such time of

day, November 5 and 6, 1898, that he could not have been at Richford, Vt., the place where the burglary was committed, at the time it occurred. Independently of these entries, the witness, Keith, and several other witnesses improved by the respondent in support of the alibi, could not testify that the respondent was at West Lebanon, November 5 and 6, 1898. Keith in his examination in chief, testified that the entries were made by him and were in his hand-writing, and were made at the time they purport to have been made. On cross-examination he was asked the following question in regard to one of the entries: Ques. "Won't you state whether or not that bears evidence of an erasure or change?" Ans. "Well it looks like it." No objection was made nor exception taken to this question until after it had been answered. There is nothing in the record to show that the question was answered before an objection could have been interposed, and this court cannot presume such to have been the fact. Hence, the exception cannot now avail the respondent. *State v. Ward*, 61 Vt. 185. However the question was proper, as it was in effect an inquiry as to whether the entry then appeared as it did when it was made by him. These entries were put in evidence by the respondent. It was contended on the part of the respondent that this livery book was kept in the regular course of the livery business of Sargent, and it was not error to admit in evidence the entire page of the book on which the entries were made and the other parts of the book which were admitted. It was competent to show in this way so far as disclosed by the book itself, how in fact it was kept as a book of entries showing the business transacted by this livery stable as it occurred from day to day.

Page "A" of Bennett's livery stable book was also properly admitted to show how the entry on that page, on which the respondent relied for fixing a date material to his alibi, was entered thereon. The respondent had put in evidence the entry showing such date. An inspection of the entire page tended to show that such entry had been interlined at the bottom of page "A"

after the amounts previously entered thereon had been footed up and the amount of the footing entered at the bottom of the page, and that such amount had been changed so as to include the amount named in the entry on which the respondent relied. The State was not precluded from thus showing how the entry was made as appeared by the book, because the person who made it, when improved as a witness, was not interrogated as to the apparent interlineation or change in the footing. The objection by the respondent to the admission of page "A" was limited to the ground that such inquiry had not been made.

II. D. H. Sargent was improved as a witness by the respondent, and his evidence tended to prove that the respondent was in New Hampshire when the burglary was committed. On his cross-examination it was competent for the State to elicit from him the facts that respondent left said Sargent's hotel at West Lebanon Dec. 22, 1898, and that about two weeks later, respondent wrote him that he was in trouble and desired the witness and one Watson to ascertain where the respondent was Nov. 5 and 6, 1898 as shown by Sargent's books, and that the receipt of this letter was the first thing that called his attention to the respondent's whereabouts on these days. Respondent's counsel in their brief suggest no reason why this evidence was not admissible. It clearly bore on the accuracy of Sargent's memory as to the respondent's whereabouts on these dates.

III. It was also competent on cross-examination of respondent's witness, Watson, to show his acquaintance and relations with the respondent, as bearing upon his interest or lack of interest in his behalf. Such interest bore upon the weight which should be given to his testimony in behalf of the respondent. It was also proper to show by the witness what his business was. It was clearly within the discretion of the trial court to permit this line of inquiry. *State v. Fournier*, 68 Vt. 270; *State v. Slack*, 69 Vt. 493.

IV. It was not error for the trial court to refuse to instruct the jury that the testimony of the witnesses, Taylor and

Grennan, who positively identified the respondent as one of the burglars who participated in the burglary, was but a mere matter of opinion. When a party identifies or recognizes another, it is not a mere matter of opinion, but is as much actual knowledge as any other fact known through the senses by which things are perceived. It cannot be said either as a matter of law or fact, that when a person meets a relative, friend or acquaintance, he cannot *know as a fact* that the one whom he thus meets is such friend, relative or acquaintance, but at most the recognition is only an opinion, a belief. Such intellectual refinement would be wholly inapplicable to the administration of justice through the courts, or to the ordinary affairs of life.

Nor was it error to refuse an instruction that "such testimony should be subject to the closest scrutiny." *Noyes, French & Fickett v. Parker*, 64 Vt. 384. In that case, the province of the court and jury in respect to admissible evidence was considered and passed upon, as well as the right of the trial court in its discretion to give cautionary instructions, and this court adheres to what it there decided on this subject. The jury were instructed to fully consider all the circumstances and conditions under which these witnesses claimed to have seen the respondent at the time of the burglary as well as the circumstances of his subsequent identification, claimed to have been made by them. The jury were also told that they were not bound by the fact that these witnesses testified that the respondent was one of the burglars, and it was left for the jury to say what weight it would give to this testimony thus considered, and taken in connection with the evidence introduced by the respondent in support of an alibi. By such an instruction the respondent was given his full legal rights in that behalf.

V. The respondent requested the court below to charge the jury that if they were satisfied by a fair balance of the testimony that he was at West Lebanon at the time of the burglary, the verdict should be not guilty. To the refusal of the court to so

charge, he excepted. On the subject of the alleged alibi, the court among other things instructed the jury as follows:—

“An alibi is a defense which is established by showing that the person charged with the crime was at some place other than that where the crime was committed, at such a time that he could not have been at the place of the crime at the time of its commission. If the evidence offered to establish an alibi fails to show the accused at the place claimed at such a time that he could not have been where the crime was committed at the time of its commission, the alibi fails. In other words, if the accused might have been at the place he claims at the time shown, and yet might have been at the place of the crime at the time of its commission, there is no alibi. Of course, if it appears that the respondent was at West Lebanon at such a time that he could not have been in the Richford bank between the hours of two and three in the morning of November 6th, the alibi is made out, and the defense is complete.” The respondent excepted to the charge as to what constitutes an alibi. Neither of these exceptions can be sustained. That part of the charge above quoted correctly and clearly defines an alibi, and this instruction was given for that purpose. It does not attempt to state the burden of proof resting upon the respondent in respect to his defense of an alibi considered as a separate issue. The jury were instructed that the State must establish the guilt of the respondent beyond a reasonable doubt to entitle it to a conviction, and that if the evidence in support of the alibi in connection with the other evidence, raised in their minds a reasonable doubt as to his guilt, he was entitled to an acquittal. This was a correct statement of the law, and more favorable to the respondent, than the instruction asked for by the request would have been. It was proper to thus submit the question of the alibi, instead of treating it as an independent issue. The respondent thus had all the benefit he could possibly derive from the evidence in support of the alibi. It would not have been error to have instructed the jury on the subject of an alibi separ-

ately from the main question. *State v. Ward*, 61 Vt. 192. Submitting the case to the jury as it did, there was no occasion for the trial court to charge the jury as to the measure and burden of proof applicable to an alibi considered separate and apart from the main question as to whether on all the evidence the guilt of the respondent was established beyond a reasonable doubt; therefore its omission to charge on that subject was not error.

Judgment that there is no error in the proceedings of the County Court and that the respondent take nothing by his exceptions.

A PETITION FOR A NEW TRIAL brought by the respondent to the Supreme Court was heard with the case on the exceptions. The petition was based on newly discovered evidence and was supported by a large amount of testimony, in the way of affidavits, in part cumulative and in part having a tendency to meet testimony introduced by the State in rebuttal.

THOMPSON, J. The respondent's petition for a new trial was heard with his exceptions. The evidence in support of his petition is such that a new trial should be granted.

Verdict set aside, new trial granted and cause remanded to County Court.

Taft, C. J., dissented on question of new trial.

CONNECTICUT GENERAL LIFE INSURANCE CO. v. MYRON F. CHASE
ET AL. AND TRUSTEES.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed March 3, 1900.

*Bond of employee—Duty of obligee to sureties—Fraud in concealing past dishonesty of employee—Non-liability of sureties without notice—*It is the duty of an employer in taking a bond for the honesty and fidelity of an employee to disclose to the sureties thereon the employer's knowledge of past misappropriations of money amounting to criminality on the part of such employee, in the course of his business as such employee, and if such disclosure is not made the sureties are not liable unless they in fact had knowledge or information concerning such misappropriations when they signed and delivered such bond.

*Practice—Case remanded for further findings—*This case, which was a suit by an insurance company on an agent's bond, was heard by a referee, and the above rule being applicable, and the report not showing whether in fact the defendant sureties did or did not have such knowledge or information, no final disposition was made of the case, but the cause was remanded that the facts as to such knowledge and information, or the want thereof, might be made a part of the record.

ACTION to recover for the breach of a writing obligatory, executed by the defendant, Myron F. Chase, as principal, and by the other defendants, Arthur E. Ellis, P. J. Chase, Isabelle Chase and Morton Marvin, as sureties, and delivered to the plaintiff.

Heard upon the report of a referee, Washington County, September Term, 1899, *Watson, J.*, presiding. Judgment *pro forma* and without hearing was rendered for the plaintiff on the report. The defendants excepted.

Dillingham, Huse & Howland for the plaintiff.

Senter & Goddard for the defendant Marvin.

WATSON J. Prior to April, 1888, Frank C. Griswold was in the employ of the plaintiff as superintendent of agencies, and as such, had authority to appoint agents and make arrangements

and trades with them, subject to the approval of the company, and thus he continued until after the execution and delivery to the company of the bond in question by the defendants on the 17th day of October, 1893. Acting in that capacity, Griswold, in April, 1888, employed the defendant, Myron F. Chase, to work for the plaintiff, and within a month thereafter, Chase entered upon his employment and thenceforth thus continued until April, 1896. At the time of Chase's first employment, the plaintiff advanced to him about three hundred dollars, understanding from his statement to Griswold that he was to use it to pay a note of the same amount to Mr. Bull, agent of the Phoenix Mutual Life Insurance Company, which amount, Chase, afterwards and before the giving of the bond in question, repaid to the plaintiff.

On the first day of April, 1893, Chase and the plaintiff entered into a written contract whereby the former was made the general agent of the latter at Montpelier and vicinity, to solicit and procure applications for insurance, deliver policies issued thereon, also premium receipts upon payment to him of the moneys named therein; and Chase was to hold the moneys thus collected as a fiduciary trust, not apply them to any personal use or purpose whatever, keep full and accurate accounts thereof, and on or before the fifth day of every month, transmit to the plaintiff a full and true report of all collections made, and of all expenses incurred, and therewith transmit and pay over the amount of moneys due the plaintiff, received by him, as such agent, and not before paid over; and that he should furnish to the plaintiff and maintain with it, a sufficient and satisfactory bond for the faithful performance of the duties pertaining to his agency, and for the prompt payment of all moneys and securities received by him.

About two weeks prior to the giving of the bond in suit, Griswold came to Montpelier, in his representative capacity for the plaintiff, and found that Chase had collected and not accounted for premiums of the plaintiff, amounting to between a

thousand and twelve hundred dollars, whereupon Griswold and Mr. Hudson, the plaintiff's secretary, who was also present, agreed with Chase that he might continue in the plaintiff's employment upon condition that he pay the shortage and furnish a new bond. Thereafter and before the giving of the new bond, Chase, through his friends, procured the amount of his arrearage and paid the same to the plaintiff.

With matters standing in this way, the bond in question was executed and delivered to the plaintiff on the 17th day of October, 1893, conditioned that, "Whereas the above named M. F. Chase has been appointed by said company its agent for the purpose of procuring applications for life insurance, collecting premiums thereon, and performing such other duties in connection therewith as may be entrusted to him; now, if the said Myron F. Chase shall promptly pay and deliver over all moneys belonging to said company, in his possession or under his control, or for which he shall be liable and responsible, under the terms of this contract with said company, and shall render regular, true and full accounts to said company of all property belonging to it in his hands, and shall faithfully discharge his duties as agent of said company, then this obligation shall be null and void; otherwise," in full force.

This bond was signed by the other defendants as sureties for Chase, and the plaintiff's agent, Griswold, was present when Ellis and when Marvin signed it and had an opportunity to disclose to them, respectively, all facts in reference to advancement of money to Chase by the plaintiff, and in reference to Chase's previous delinquencies and defalcations while in the plaintiff's employ, but made no disclosure to either of them, nor to either of the other sureties, relative thereto, by reason whereof the sureties contend that they are not liable upon the bond.

Chase ceased to do business for the plaintiff on April 15, 1896, at which time he had failed to pay over to the plaintiff its moneys that he had collected, in the performance of his duties

as agent, to the amount of \$1029.04. This money he had converted to his own use.

The facts reported show that Chase's shortages occurred from the beginning of his agency and continued throughout the same, and that a part of the money used by him causing the defalcation discovered just prior to the giving of this bond, was used to repay to the plaintiff the advancement of \$300; and that the money borrowed by Chase to pay that defalcation was repaid by again using the plaintiff's money and thereby causing the defalcation for which recovery is sought in this suit.

All of this money came into Chase's possession or under his care by virtue of his employment, and he fraudulently converted the same to his own use in violation of the terms of his trust, and, evidently, it was to guard against any loss resulting to the plaintiff by reason of a similar breach of trust in the future, that a new bond was demanded as one of the conditions of his remaining in the plaintiff's employ.

It is contended in behalf of the plaintiff that the prior shortages did not amount to embezzlement or dishonesty on the part of Chase, but with this contention we cannot agree.

The facts reported show him guilty of a fraudulent conversion to his own use, without the consent of his employer, of money that came into his possession or under his care, by virtue of his employment as agent, for which he was liable criminally, under the provisions of section 4951, V. S.

It was the duty of the plaintiff, knowing that the other defendants were about to sign, as sureties, Chase's bond conditioned as is the one in question, to fully disclose to them and each of them the facts relative to Chase's previous defalcations or fraudulent conversions, and the conditions under which he was allowed to remain in the plaintiff's employ. No such disclosure was made, and the sureties had a right to understand that the plaintiff was acting in good faith toward them, and that the previous dealings of Chase with the plaintiff had been with integrity and not in criminal breach of his trust.

The plaintiff, through its authorized agent, then knew or had reason to believe that, were the facts as to Chase's previous malpractices made known to the sureties, their intended actions relative to the signing of the bond would probably be changed; and to allow them to sign it, under the circumstances, without giving them such information, was not acting in good faith and was such a fraud upon their rights by the plaintiff, unless they were otherwise informed relative thereto, as will operate to discharge the sureties from all liability upon the bond. *Richmond v. Standclift*, 14 Vt. 258; *Sooy et al. v. State of New Jersey*, 39 N. J. L. 136; 1 Story Eq. Jur. sec. 215.

We think the law upon this subject is well stated by Chief Justice Beasley in *Sooy et al. v. State of New Jersey*, that, "It is the duty of a person taking a guaranty for the good conduct of an employee, to disclose the past malpractices of such employee in the course of the business to which the guaranty relates, and that if such duty is not performed, the instrument so taken is, *ipso facto*, invalid. The continuance of an agent in an employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect, and hence it must, under usual circumstances, have all the effect of a meditated fraud, if the person so retaining the agent can be permitted to disown the implication inevitably arising from his own conduct."

But it is contended by the plaintiff that the facts reported do not show the sureties without knowledge or information concerning the past malpractices of Chase, when they signed and delivered the bond, and therefore, under the law as laid down in *State v. Bates*, 36 Vt. 387, they are not relieved from liability. It is true, the record does not show how the fact was in that regard, and the plaintiff's contention is sound as the case now stands; but we think that no final disposition of the case should be made, until the fact of whether the sureties did or did not have such knowledge or information, is made a part of the record; and that then, judgment should be rendered accordingly. And

judgment will be reversed *pro forma*, and cause remanded for that purpose.

JAMES SEVERANCE v. NEW ENGLAND TALC CO.

January Term, 1900.

Present : ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed March 9, 1900.

*Negligence—Duty of employer—Employer a mining company—*It is the duty of a mining company in excavating a shaft, to be duly careful to leave the walls in a reasonably safe condition.

*Risks due to master's negligence not assumed as incident to the employment—*Risks which ought not to exist, and which would not exist but for the master's negligence, are not among those assumed by the servant as ordinarily incident to his employment.

*Special assumption of risks due to master's negligence—*There is no special assumption by a servant of a risk due to the master's negligence, unless the servant knows or ought to know of the unnecessary risk so caused.

*The case—Question of defendant's liability for the jury—*In view of the evidence reviewed in the opinion, the plaintiff, an employee of the defendant, was entitled to go to the jury upon the question of the liability of the defendant for injuries received by the plaintiff by the falling upon him of a mass of broken rock while he was at work as such employee in the defendant's talc mine.

CASE FOR NEGLIGENCE. Plea, the general issue. Trial by jury, Rutland County, September Term, 1899, *Taft*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

At the close of the evidence the defendant moved that the court direct a verdict in its favor, on the ground that there was no evidence in the case entitling the plaintiff to recover.

Butler & Moloney for the plaintiff.

Hunton & Stickney for the defendant.

MUNSON, J. The plaintiff, an employee in the defendant's talc mine, while working on a platform built in the shaft at the entrance to a drift, was injured by a mass of broken rock, which became detached from the north side of the shaft at a point some twenty-five feet above the platform. He had then been at work in the mine about four weeks, but he had worked there nearly four months in the preceding year. The shaft was made by taking out a vein of talc, and was entirely excavated at the point in question before the plaintiff's first employment. The workmen entered and left the mine on the south side of the shaft, the width of which from north to south was about twenty feet. The only light they had was from ordinary lanterns carried with and hung near them; and they could scarcely see the place from which the rock fell, either in passing up and down or from the platform where they worked.

Talc is described in the evidence as a mineral soapy to the touch, and easily dislodged because of its slippery character. A vein of talc is usually separated from the solid rock by a mixture of talc and quartz, the limit of which is easily determined; and safety requires that both the pure talc and the surrounding mixture be entirely taken out. The material which fell upon the plaintiff consisted of this mixture.

The evidence tending to establish the above facts presented a case on which the plaintiff was entitled to go to the jury, and the defendant's motion for a verdict was properly overruled. It was the duty of the defendant in excavating the shaft to be duly careful to leave the walls in a reasonably safe condition. *Union Pacific Ry. Co. v. Jarvis*, 3 C. C. A. 433; *Western Coal and Mining Co. v. Ingraham*, 17 C. C. A. 71. Risks which ought not to have existed, and which would not have existed but for the master's negligence, are not included in the risks assumed as ordinarily incident to the employment. *Dumas v. Stone*, 65 Vt. 442. There was no special assumption of this risk, for it does not appear that the plaintiff knew or ought to have known that the wall had been left in an unnecessarily dangerous condition.

Judgment affirmed.

MCINTYRE & WARDWELL v. ISAAC H. WILLIAMSON.

January Term, 1900.

Present: TAFT, C. J., ROWELL, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed March 9, 1900.

Personal liability of trustees—The plaintiffs had dealings with the defendant in which he was designated "trustee," and sued him personally on a claim based on such dealings. That the defendant was a trustee dealing on account of his trust, and that the plaintiffs so knew, were not facts sufficient to protect the defendant from personal liability.

Same—Transactions within scope of trusteeship—A trustee may be personally liable on dealings conducted in behalf of the trust, within the limits prescribed by law in that regard. In such cases he can secure reimbursement from the trust fund.

Trustee how relieved from personal liability—A trustee, in dealings on account of his trust, can relieve himself from personal liability only by a definite understanding with those with whom he deals that the transactions are had otherwise than upon his personal responsibility.

Rules as to liability of agent not applicable—The rules which determine the liability of an agent are not applicable to trustees.

ASSUMPSIT. Plea, the general issue. Trial by jury, Windham County, March Term, 1899, Tyler, J., presiding. Verdict and judgment for the defendant. The plaintiffs excepted.

The verdict was directed by the court on the motion of the defendant set out in the opinion. The plaintiffs were brokers, and the defendant, at the time of the transactions in question, was vested with the legal title of a fund bequeathed to him by his father in trust.

The claim of the plaintiffs grew out of transactions in the purchase and sale of stocks, etc., by the plaintiffs in their business as brokers.

Haskins & Schwenk for the plaintiffs.

Waterman & Martin and *Clarke C. Fitts* for the defendant.

MUNSON, J. The action is general assumpsit. The court directed a verdict for the defendant on a motion which assigned

as grounds therefor that the plaintiffs dealt with the defendant in his capacity as trustee, and that the plaintiffs' testimony disclosed no cause of action under the pleadings. The case stands upon the plaintiffs' exception to this ruling.

The dealings upon which the suit is based were had by and with the defendant as "trustee." He could become personally holden notwithstanding the use of this term. The legal estate was in him, and he was acting for himself in managing it. His official title served only as a personal description, and to separate the dealings from those pertaining to his personal matters. If he dealt in behalf of the trust estate, and within the limits prescribed by law, he can secure reimbursement from the fund. But the parties with whom he dealt can hold him personally liable, whatever his situation as regards the trust estate. The fact that they knew of the trust and that he was dealing on its account, will not protect him. He could relieve himself from personal liability only by a definite understanding that the transactions were had upon some other responsibility. It was error to direct a verdict for the defendant upon the case disclosed by the evidence. 27 A. & E. Ency. Law, 221; 1 Parsons on Contracts, *121; *New v. Nicoll*, 73 N. Y. 127; *United States Trust Co. v. Stanton*, 139 N. Y. 531; *Mulrein v. Smillie*, 25 App. Div. (N. Y.) 135; *Hackman v. Maguire*, 20 Mo. App. 286; *Glenn v. Allison*, 58 Md. 527.

The decisions of this court to which we are referred are not at variance with the rule above stated. In *Blaisdell v. Stevens*, 16 Vt. 179; *Townsley v. Barber*, 27 Vt. 417; and *Walston v. Smith*, 70 Vt. 19, the question was as to the rights acquired against the beneficiaries by conveyances from or dealings with the trustee. The other cases cited were cases of agency, and the rules which determine the liability of an agent are not applicable to trustees.

Judgment reversed and cause remanded.

MOSES SHELDON, ASSIGNEE, v. LOUISE CLEMMONS.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed March 27, 1900.

*Chancery—Appeal from final decree carries up the whole case—*A defendant demurred to a part of a bill in chancery, and answered the remainder. The demurrer was sustained and the orator did not appeal. The cause was referred to a special master, and on the coming in of the report a decree was entered dismissing the bill, from which the orator appealed. As the decree sustaining the demurrer was interlocutory, the orator could not have appealed therefrom, and the appeal from the final decree brought the whole case into the Supreme Court.

*Collusive judgment—Failure to plead a proper offset not conclusive of fraud—*When it is claimed that a judgment was obtained by collusion for a larger sum than the plaintiff was entitled to, for the purpose of defrauding other creditors of the defendant, the mere fact, unexplained, that the defendant did not plead in offset demands which might have been so pleaded does not establish the allegation of fraud.

*Finding of master conclusive—*When there is substantial evidence to sustain the finding of a master, his finding is conclusive.

CHANCERY. Heard upon pleadings, master's report, orators exceptions to the report and a motion to recommit the same, at the June Term, 1899, Bennington County, before *Munson*, Chancellor. Decree *pro forma* overruling the orator's exceptions and motion and dismissing the bill with costs to the defendant. The orator appealed.

W. B. Sheldon for the orator.

Barber & Darling, J. K. Batchelder and *F. C. Archibald* for the defendant.

TYLER, J. It appears from the master's report that the defendant brought a suit in the Bennington County Court against her brother, Warren Clemmons, in which she sought to recover a balance which she claimed was due upon her sale to him, in February, 1881, of all her interest in the personal and real estate of

their father. In consideration of the sale and conveyance Warren was to pay all the defendant's existing liabilities and pay her the difference between the amount thereof and the value of the property conveyed, which value was never agreed upon. The suit was tried at the June Term, 1894, and this defendant obtained a judgment for \$3,180 and costs, which was affirmed by this court at the January Term, 1895. 68 Vt. 77.

In December, 1894, the orator was appointed assignee in insolvency of Warren Clemmons' estate, and in June, 1895, he brought this bill, alleging that said judgment was obtained through the fraud and collusion of the parties to that suit, and praying that this defendant be enjoined from enforcing her judgment lien upon the insolvent estate. The defendant demurred to a part and answered the remainder of the bill. The demurrer was sustained and the allegations contained in the part of the bill demurred to were held insufficient, and no appeal was taken by the orator. Upon the coming in of the master's report, the Court of Chancery, *pro forma*, overruled the orator's exceptions thereto and his motion to recommit, and entered a decree dismissing the bill with costs, and the orator appealed.

The defendant presented the judgment which she obtained in this court to the Court of Insolvency, and it was allowed. The orator appealed to the County Court, which rendered judgment for the defendant, and there was an affirmance by this court at the May Term 1897. 69 Vt. 545.

As the decree of the Court of Chancery, sustaining the demurrer, was not final but interlocutory, the orator could not have appealed from it. V. S. 981. That decree remained in the Court of Chancery until the final decree was made, when the appeal therefrom brought the whole case here. Upon consideration we hold that the demurrer was properly sustained. If it were found necessary to overrule it in this court, the allegations demurred to would stand admitted, under the rule that the effect of a demurrer is to admit all facts that are well pleaded. The situation would then be that a part of the allegations in the bill

stood admitted, while the master found that the allegations to which the defendant had filed her answer were not sustained. This would cause no embarrassment, however, for, upon the case being remanded, leave would be given the defendant to apply to the Court of Chancery for permission to withdraw the demurrer and answer the allegations that had been demurred to, and such permission would generally be granted. This is the usual practice when the demurrer is to the whole bill, and would doubtless be followed when it is to a part, unless the case were exceptional. If such answer were filed, the case could then go to a master for a further finding and report, if necessary in making a final decree.

The main question in the case was the one submitted to the master, whether there was a collusive agreement or understanding between the parties to the suit at law, to the effect that the plaintiff therein should obtain a larger judgment than she was entitled to, and thereby defraud the defendant's other creditors. The master states that this was the proposition upon which the orator based his claim. It was evidently a sharply controverted question, Warren contradicting his testimony in the suit at law and testifying that there was such an agreement, and his sister denying it. It was the master's province to determine that question upon the evidence, and he has found that there was no collusion, and his finding is conclusive. He finds that the defendant, in the suit at law, had demands upon which the plaintiff was liable with others, which, by the terms of the agreement between the parties, were applicable to the plaintiff's demand against the defendant and might have been pleaded by him in offset or in payment. Why they were not so pleaded the master is unable to find, but does find that it was not by reason of any collusion between the parties. The mere fact, unexplained, that the defendant in that suit did not plead his demands in offset, does not establish the allegation of fraud and entitle the orator to have the judgment set aside.

The pro forma decree is affirmed, cause remanded with mandate that the bill be dismissed.

HYDE PARK LUMBER COMPANY v. E. D. SHEPARDSON.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed April 5, 1900.

Disqualification of judge—A judge is not disqualified from sitting in a cause, for the reason that he and one of the parties are stock-holders in the same company, when the disposition of the cause cannot in any manner affect the interests of such company or the interest of either as a stockholder in such company.

Title to material attaches to manufactured product—When by the terms of a contract the title to certain logs vested in the plaintiff, butter-tubs thereafter manufactured from the logs by the other party to the contract belonged to the plaintiff.

Ownership of property not relinquished by taking mortgage upon the same—The plaintiff, by taking, from the manufacturers of a product which in fact belonged to the plaintiff, chattel mortgages upon the same, did not, in law, relinquish its ownership of the product. It did not lose its right of ownership by the exercise of such over-abundant caution.

Conversion—Right to take orders gives no right of sale—A right, on the part of the manufacturer of a product from the material of another, to take orders for the product, and to be paid for taking such orders, gives the manufacturer no right to sell the same, and a sale and delivery by him in his own right, and without the knowledge and consent of the owner, and in disregard of the rights of the owner, constitute a conversion of the property so sold and delivered.

Findings based on evidence conclusive—In a case tried by the court, a finding made by the trial court is conclusive if there was evidence tending to support it.

ACTION OF TROVER. Trial by court, Lamoille County, June Term, 1900, Watson, J., presiding. Judgment for the plaintiff on facts found. The defendant excepted.

Before the introduction of any evidence in the case, question was made as to whether Assistant Judge Morse, who sat in the case, was not disqualified on the ground stated in the opinion.

R. W. Hurlburt and *George M. Powers* for the plaintiff.

Watson & Flinn for the defendant.

TART, C. J. Was Judge Morse disqualified in the case at bar?

He was an owner of stock in the Morse Lumber Company and the plaintiff was a like owner. A disposition of the case before us would not in any manner affect their interests nor the interest of either party in the Morse Company. The property of the latter company could not be increased nor diminished by any result in the case before us, nor would the interest of Judge Morse be in any way affected. He could properly sit in the case.

This cause, we infer from the docket entries, is an action of trover (although the exceptions are silent on the point) for several hundred butter tubs.

The plaintiff claims the tubs by virtue of a contract with Brown & Son, who manufactured them under an agreement with the plaintiff, and also by force of two chattel mortgages executed subsequently to the contract. Brown & Son sold the tubs to the defendant and the validity of the sale depends upon the right of Brown & Son to make it.

Exhibits 1, 2, and 3 are found by the court below to constitute the contract between the plaintiff and Brown & Son, and such finding is conclusive. We cannot revise a finding of fact when there was testimony in the case tending to support it, and there clearly was in this case.

By the terms of the contract the logs in question were purchased in the name of and for the plaintiff and the title to such logs vested in the plaintiff and when manufactured, the plaintiff was to sell the manufactured product. The logs belonging to the plaintiff, the product of them, when manufactured, likewise belonged to it. By force of this contract, the tubs never became

the property of Brown & Son. They were the property of the plaintiff, and if so, they were, in law, sold as the property of the plaintiff. The fact that Brown & Son executed mortgages of the property to the plaintiff, did not, in law, release the rights that the plaintiff then had in it, by force of the contract. They would not lose their rights under the contract by the exercise of an "over-abundant caution" in taking the mortgages. Brown & Son could take orders for the property, but that made no change in the title to the lumber, nor its manufactured products. Brown & Son were paid, on certain conditions, twelve and one-half cents per thousand for such lumber as they might take orders for.

The court below found that in selling and delivering these tubs to the defendant, James Brown & Son disregarded the terms of the contract and sold and delivered them, not in compliance therewith, but wrongfully and in their own right and without the knowledge and consent of the plaintiff. This finding is conclusive against the right of the defendant. Therefore, the various questions regarding the chattel mortgages become immaterial.

Upon the finding of facts, there is no question but that there was a conversion of the property and the

Judgment should be and is affirmed.

W. H. CARTER v. CENTRAL VERMONT RAILROAD COMPANY.

May Term, 1899.

Present: TAFT, C. J., TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed April 13, 1900.

Contributory negligence—Plaintiff's negligence disclosed by his own case—If, in an action based on the alleged negligence of the defendant, the case made by the plaintiff discloses the fact that his own negligence caused or con-

tributed to the injury, he is not entitled to recover. The defendant's negligence must have been the sole cause of the injury.

Negligence of traveler at railroad crossing—If a traveler in approaching a railroad crossing might, by the use of the vigilance which the law requires, discover and avoid danger from an approaching train, and omits to exercise such vigilance, he is guilty of negligence.

Traveler's duty at railroad crossing in respect to vigilance—It is the duty of a traveler in approaching a railroad crossing to look and listen for an approaching train. When either his sight or his hearing cannot be effectively used, he must be more alert in the use of the other, and an obstruction of both or either may make it his duty to stop, as well as to look and listen.

Prudence must attend vigilance—If a traveler at a railroad crossing sees or hears an approaching train and is then injured in consequence of an imprudent or daring attempt to cross the track in advance of it, he cannot recover for the injuries so received.

Traveler and railroad company—Reciprocal duties—Traveler may not neglect duty in reliance upon company's performance of duty—It being the legal duty of a traveler upon approaching a railroad crossing to look and listen for an approaching train, he cannot without fault omit such precaution in reliance upon the performance by the railroad company of its duty to give notice of the approach of a train by signals.

Plaintiff's testimony viewed as a whole in determining its tendency—It avails nothing for a plaintiff to testify to the effect that he both looked and listened in approaching a railroad crossing at which he was injured, when his account of the occurrence of the injury shows conclusively that he was wanting either in vigilance or in prudence.

When the question of negligence is for the court—The question of contributory negligence becomes one of law for the court, when from the undisputed facts reasonable minds can draw but one conclusion.

The case—Verdict properly directed for defendant—In this case the uncontradicted testimony of the plaintiff disclosed the fact that in driving upon the defendant's track he was guilty of negligence which contributed to the injury for which he sued, and a verdict for the defendant was properly directed.

CASE for personal injuries received by the plaintiff from a moving train while he was crossing the defendant's railroad track at grade at a highway crossing in Bethel. Plea, the general issue. Trial by jury, Caledonia County, June Term, 1897

Rowell, J., presiding. Verdict for the defendant directed on motion. Judgment on verdict. The plaintiff excepted.

There was no evidence tending to show that the defendant did not do what it could to avoid disaster after it discovered the plaintiff in a position of peril.

The case was twice argued before the Supreme Court.

Wendell P. Stafford for the plaintiff.

Dunnett & Slack and *Hunton & Stickney* for the defendant.

TYLER, J. At the close of the plaintiff's testimony, the defendant moved the court to direct a verdict for the defendant for that it appeared that the plaintiff was guilty of contributory negligence in approaching and driving upon the railroad track with too great speed, and in not using his eyes and ears with vigilance to discover and avoid the approaching train. The court granted the motion and directed a verdict and judgment for the defendant, which direction the plaintiff claims was error.

There being no conflict in the testimony in respect to the facts and circumstances attending the occurrence of the accident, the only question was whether those facts and circumstances were so decisive of the plaintiff's contributory negligence that there was no room for rational doubt upon the subject.

The rule has been stated in many different forms, but it is this in substance: when it appears from undisputed facts, from the plaintiff's own evidence, that he was not in the exercise of that degree of care which careful and prudent men would exercise in circumstances of like exposure and danger, the question of the plaintiff's right to recover is one of law for the court.

If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts. The judge takes the case from the jury only when it is susceptible of but one just opinion. *Ill. Cen. R. R. Co. v. Nowicki*, 148 Ill. 29, 60 Am. and Eng. R. R. Cas. 690. In *Schriber v. R. R. Co.*, (Minn.) 2 Am. and Eng. R. R. Cas. N. S. 289, after remarking that the

decisive test is whether or not fair-minded men could honestly differ as to the inferences to be drawn from admitted facts, Start, C. J. said: "This rule must be applied in practice with caution, lest the courts usurp the functions of the jury, and unwittingly deprive a party of his constitutional right to a trial by jury; and, if there is a fair doubt as to the inferences to be drawn from an admitted state of facts, the question must be submitted to the jury; but, in the absence of such fair doubt, it is equally the duty of the court to decide the question as one of law and instruct the jury accordingly."

S. & R. on Neg. sec. 56, state the rule thus: "When the facts are clearly settled, and the course which common prudence dictated can be so clearly discerned that only one inference can be drawn * * * it is the duty of the court to take the case away from the jury. * * * The question is then one of law for the court to decide." *Worthington v. R. R. Co.*, 64 Vt. 107.

The duty of a traveler on arriving at a railroad crossing to look and listen for an approaching train seems too obvious to require judicial declaration, yet it has been stated in numerous cases. Some courts go further and make it the traveler's duty to *stop* and look and listen; but the rule requiring the traveler to stop, though a wholesome rule, cannot well be adopted as one of general application, for in some localities the traveler can see the track so great a distance that he can determine by the sense of sight whether or not he can safely cross, as in *Manley v. D. & H. Canal Co.*, 69 Vt. 101. But when the view is obstructed it may be his duty to stop in order to listen effectually, and especially is this the case when his hearing is obstructed by the noise of his own carriage or by objects situated between him and the track. It has so often been stated that the traveler must approach a railroad crossing with his senses of sight and hearing alert for danger that it may be said to have become a maxim. When the situation is such that one of these senses cannot be

fully used he must be more alert in the use of the other. By the impairment of these senses or either of them, or by the intervention of objects to obstruct his sight or hearing, ordinary care may require him to stop in order to ascertain with reasonable certainty, before driving upon the track, that a train is not approaching. *Manley v. D. & H. Canal Co.*

In *Fletcher v. Fitchburg R. R. Co.*, 149 Mass. 127, it is stated: "As a general rule a person is not in the exercise of due care, who attempts to cross a railroad track without taking reasonable precaution to assure himself by actual observance that there is no danger from approaching trains."

Let us apply these rules, which are as well settled as any rules of law, to the facts in this case.

The plaintiff was driving a pair of heavy, slow horses, attached to a wagon and load of about a ton's weight; he was a stranger in the locality but was apprised of the crossing by a sign which was visible for a distance of forty-seven rods before he reached it, and which he testified he saw; he had also seen a train going south a short time before; he also testified that he was watching for a train as he drove along, and that no signals were given.

The crossing was dangerous; an approaching train was hidden from the traveler's view until he was near the crossing, and the sound of it was obstructed by an intervening embankment; the crossing itself was on a curve in the track. The plaintiff, who, as the exceptions state, had good sight and hearing and was ready to act in an emergency, trotted his horses along at the rate of four or five miles an hour, his heavy team making some noise on the frozen ground, and, without stopping or slackening his speed, he drove upon the crossing. When his horses' forward feet were between the rails his near horse threw up its head and looked over the other one's neck, which attracted the plaintiff's attention, and he then looked around and saw the engine just appearing in sight in the cut at the angle or curve in the highway, and at a distance of from eight to twelve rods from

him. Whatever the exact distance was, the plaintiff was not able to urge his horses across the track in time to prevent a collision and injury.

The plaintiff testified that when he noticed this action of his horse he spoke to it and said, "what is the matter," * * and looked around to see—and right—about this angle here—the engine just appeared in sight in the cut." In another connection he said that when he noticed the action of his horse he looked up. Witnesses called by the plaintiff testified that when his horses' forward feet were between the rails the plaintiff could have seen up the track two hundred feet; others said that when near the track he could have seen seven or eight rods.

If the case made by the plaintiff discloses the fact that the accident happened as a result of his negligence, or that his negligence contributed to it, he is not entitled to recover. The defendant's negligence must have been the sole cause of the accident. Ordinary care, on the plaintiff's part, in the circumstances, required him to approach the crossing with his senses alert for danger. The plaintiff's counsel would hardly contend that, if the plaintiff had seen the train before he reached the crossing, he would have been in the exercise of ordinary care in attempting to cross. The train was too near and running too fast for such an undertaking. It was said by the court in *Blake's Exr's. v. R. R. Co.*, 30 N. J. Eq. 240: "A person intending to cross a railroad track is bound to look and listen for an approaching train; and if he sees or hears a train approaching, and then daringly assumes the hazard of attempting to cross in advance of it, and fails, he must bear the consequence of his folly." Similar language was used by Mr. Justice Field, in *R. R. Co. v. Houston*, 95 U. S. 702. The same was held in *Burnett v. R. R. Co.*, (N. J. L.) 38 Atl. 663, and in *State v. R. R. Co.*, (Md.) 39 Atl. 610.

If, by the vigilant use of his eyes and ears—which in the circumstances is only ordinary care—the plaintiff might have discovered and avoided the danger, and omitted such vigilance,

he was guilty of contributory negligence; and he is chargeable with such knowledge of the approach of the train as he might have obtained by the exercise of that degree of care, which in the circumstances of danger, he was bound to use.

The decisions have been somewhat diverse upon the subject of directing verdicts in cases similar in their facts to the present one.

In *Chase v. R. R. Co.*, 78 Maine 346, the plaintiff's intestate approached the crossing, trotting his horse and without slackening his speed, and just as his horse's head reached the crossing, a train of cars that had been concealed from his view, shot out of a cut and upon the crossing, so that his sleigh was upset and himself fatally injured. The court said there could be no doubt that if the intestate had stopped so he could have listened attentively, he would have heard the train, and that he could not listen carefully and effectually when driving a team with sleigh-bells attached without stopping to still the noise of his team; and it was held to be negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train; that if his view is unobstructed he may have no occasion to listen; but if his view is obstructed, then it is his duty to listen, and to listen carefully; and if one is injured at a railroad crossing by a passing train or locomotive, which might have been seen if he had looked, or heard if he had listened, presumptively he is guilty of contributory negligence; and if this presumption is not repelled, a recovery for the injury cannot be had. *Allen v. R. R. Co.*, 82 Me. 111; *Smith v. R. R. Co.*, 87 Me. 339; *Giberson v. R. R. Co.*, (Me.) 36 Atl. 400.

Fleming v. R. R. Co., 49 Cal. 253, was where a traveler was driving a four-horse team along a road running parallel with, and near a railroad, and as he approached the crossing the air was so filled with dust that he could not see the railroad; *held*, that as his wagon made some noise, ordinary prudence required him to stop his team so that he might listen under the most favorable circumstances to ascertain whether a train was approaching; that

as he could not use his eyes with effect, it was incumbent upon him to make the best possible use of his ears, which he could not do while his team was in motion. In that case the court said: “* * * But the plaintiff testified that his wagon ‘made some noise,’ and every one knows that a four-horse team attached to a road wagon travelling on a trot on an ordinary road will produce sufficient noise to seriously obstruct the hearing of the driver; and when going in a walk, though the noise may be less, it will necessarily be sufficient to impede the hearing to a considerable extent. As the plaintiff could not use his eyes with effect, it was incumbent on him, as a person of ordinary prudence, to make the best use of his ears, which he could not do while his team was in motion.”

A different doctrine was held in *R. R. Co. v. Lane*, 130 Ill. 116, where the court said: “The duty of a person approaching a railroad crossing with a wagon and team, even when such wagon is old and makes considerable noise, and when he knows there are obstructions which to some extent interfere with the view of an approaching train, and also knows a train is due about that time, to bring his team to a full stop before driving upon the railroad track, is not so absolute and unqualified as that a court can say, as matter of law, and regardless of all other attendant circumstances, that such person is guilty of a want of ordinary care. It is for the jury to determine from all the facts and circumstances in proof, whether or not there was negligence, and it is not for the court to tell them that certain facts constitute such negligence as precludes a recovery.” (The doctrine of comparative negligence seems to be held in Illinois.)

It was held in *Stackus v. R. R. Co.*, 79 N. Y. 464, that the traveler need not, as matter of law, stop his team, or rise up in his wagon, or get out; that he must look both ways and listen for the approach of the train; that whether he ought to do either, or all of these things, in order to relieve himself from the charge of negligence, is for the jury to decide. The cases, *Galveston, etc. R. R. Co. v. Porfert*, (Texas) 37 Am. & Eng. R. R.

Cas. 540, and *Petty v. Hannibal, etc. R. R. Co.*, (Mo.) 28 Am. & Eng. R. R. Cas. 618, cited on the plaintiff's brief, are to the same effect. In the latter case the court held, that whether a person could have heard the train by stopping and listening was a question of fact for the jury. And see *R. R. Co. v. Griffith*, 159 U. S. 603 and *R. R. Co. v. Cody*, 166 U. S. 606, which cases, however, recognize the rule that the question of negligence becomes one of law when, from the facts, reasonable men can draw but one conclusion.

The plaintiff's counsel contends in this case that from the defendant's omission to give the statutory signals the plaintiff had a right to assume that the engine was not within eighty rods of the crossing, and that acting upon that assumption, whether he might, in the exercise of reasonable care, attempt to cross, was a question upon which men might reasonably differ. It may be noted that there is no testimony tending to show that the plaintiff drove upon the crossing relying upon the fact that the signals were not given; but we will assume that he did so rely. Thomas on Negligence, 424, lays down this rule and cites several New York cases in its support: "The fact that a traveler was not aware of the vicinity of an approaching train, that no signal was given, does not assure a safe crossing nor excuse him from using the care and vigilance otherwise required from him." Pierce on Railroads, 342, states the law as follows: "A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing, in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If by neglect of this duty he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the legal rate." See Beach on Contrib. Neg. secs. 13, 63. In the former section the author says: "The requirements of the law, moreover, proceed

beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings, as affecting the traveler, is no longer a question for the jury. The *quantum* of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all courts enforce this reasonable rule."

It is a legal duty imposed upon the traveler to look and listen for an approaching train, for this is what a prudent man would do ; therefore, as was said in *Rodrian v. R. R. Co.*, 125 N. Y. at page 528, he cannot omit such a reasonable precaution in reliance upon the performance by the railroad company of its duty to give reasonable notice of the approach of the train. The same is held in *Gorton v. R. R. Co.*, 45 N. Y. 660, in *Baxter v. R. R. Co.*, 41 N. Y. 502 and in *Salter v. R. R. Co.*, 75 N. Y. 273.

In *Fletcher v. R. R. Co.*, the court quotes with approval an expression in the opinion in *McCrary v. R. R. Co.*, 31 Fed. Rep. 531: "He (the traveler) cannot say, 'There is something temporarily obstructing my vision, but I will take it for granted that there is no danger, and undertake to cross the track. * * *' The law lays it down clearly that a man must look and listen ; and if, by looking and listening, he could ascertain the approach of a train, and fails to do so, he is guilty of contributory negligence, and cannot recover."

It was said in *Butterfield v. R. R. Co.*, 10 Allen 532: "We must assume it to be true that neither the bell nor whistle was sounded, and that the defendants violated their duty in this respect. A traveler has a right to expect that they will perform this duty ; and has some right to expect that he will hear the noise. But this expectation does not excuse him from exercising

reasonable care to ascertain by sight as well as hearing whether there is a train coming immediately upon him as he attempts to cross the track. The negligence of the company does not authorize him to maintain an action, if he also is negligent."

It was held in *Grostick v. R. R. Co.*, 90 Mich. 594, "That a person about to cross a railroad track is bound to recognize the danger, and to make use of the senses of hearing and sight, and to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk; and such conduct should be pronounced negligence by the court, as matter of law." In that case the declaration alleged and the plaintiff's evidence tended to show that the defendant was guilty of negligence in not continuously giving signals for forty rods before reaching the crossing, as the statute required.

In *R. R. Co. v. Howard*, 124 Ind. 280, an instruction that if the whistle was not sounded nor the bell rung, this was a circumstance tending to show want of contributory negligence, was held erroneous.

The New Jersey court held that the failure of the defendant to give signals will not relieve the traveler from his duty. *R. R. Co. v. Richter*, 42 N. J. L. 180. See, also, *Durbin v. R. R. Co.*, 17 Or. 5.

It was said in *Continental Improvement Co. v. Stead*, 95 U. S. 161, that travelers upon a common highway which crosses a railroad upon the same level, and the railroad company running a train, have mutual and reciprocal duties and obligations, and that although the train has the right of way, the same degree of care and diligence in avoiding a collision is required from each of them; that this right does not impose upon the traveler the whole duty of avoiding a collision, but is accompanied with and conditioned upon the duty of the train to give due and timely warning of its approach, and that the degree of diligence to be used on either side is such as a prudent man would exercise under the

circumstances of the case in endeavoring fairly to perform his duty.

This language is often quoted as an accurate and concise statement of the law respecting the correlative rights and duties of travelers and railroad companies. But the court evidently did not intend to excuse the traveler for his neglect of duty on account of the defendant's neglect, for it expressly held in *Railroad Co. v. Houston*, reported in the same volume at page 667, that the neglect of the engineer to sound the whistle or ring the bell on nearing a street-crossing does not relieve a traveler on the street from the necessity of taking ordinary precautions for his safety; that before attempting to cross the railroad track, he is bound to use his senses,—to listen and look,—in order to avoid any possible accident from an approaching train. If he omits to use them and walks thoughtlessly upon the track, or if using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. In the latter case the court did not hesitate to say from the record, that, had the plaintiff used her senses, she could not have failed both to hear and to see the train.

Some cases have come to our notice since the reargument of this case which are much in point. In *Chase v. R. R. Co.*, 167 Mass. 383, the court, after stating the duty of the traveler to use his senses of sight and hearing at a railroad crossing, said: "So, too, it may be said to be a general, though not a universal rule that, if there is anything to obstruct the view of the traveler on a highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety." This rule is cited with approval in the recent case of *McCanna v. R. R.*, (R. I.) 39 Atl. 891. The syllabus to *R. R. Co. v. Smalley*, (N. J.) 39 Atl. 695, concisely states the opinion as follows:

"The duty to look and listen before crossing a railroad includes the duty to do that which will make looking and listening reasonably effective. If there is a permanent obstruction to

sight that would make danger invisible, and a transient noise that would make it inaudible, it is negligence to go forward at once from a place of safety to a place of possible danger. Prudence requires delay until the transient noise has abated, and hearing again becomes efficient for protection." The court further said, "the plaintiff went forward into a danger which permanent obstructions made it impossible to see, and which a passing noise made it difficult to hear. The permanence of the obstructions to sight made hearing his best reliance. A few moments' delay would have given him the full benefit of it. In advancing at once while circumstances interfered with its efficient exercise, he acted with less prudence than the law exacts."

It was held in *Blackburn v. Southern Pac. Co.*, vol. 12, part 3, Am. & Eng. R. R. Cas. 461, that when the deceased, without stopping his vehicle for the purpose of listening for approaching trains, attempted to drive across a railroad track in a city street, at a crossing with which he was familiar, and from which the view of the approaching train was obstructed, and was killed by a train while making such an attempt, a verdict should be directed for the railroad company, although the traveler was approaching the crossing at a slow walk, and the train was running at an unlawful rate of speed; that a failure to stop and listen before attempting to cross, under such circumstances, was negligence *per se*. The opinion reviews the leading cases upon this subject and contains a clear statement of the law.

In the recent case of *Hearn v. R. R. Co.*, Atl. Rep. 59, the Maryland court held that a traveler in a closed vehicle, who attempted to cross a railroad, without stopping, looking, and listening for an approaching train, was negligent, and that the failure of the trainmen to give the required signals did not excuse his failure to exercise such precautions.

Numerous cases are cited upon the defendant's brief in which courts in various parts of the country have in like manner declared the law. They go upon the ground that there is a clearly defined duty imposed upon the traveler, and that unless the

facts in a given case show that he has performed that duty he is precluded from a recovery although the defendant was in fault, —in other words, that his omission of a legal duty is contributory negligence.

In *Magoon v. R. R Co.*, 67 Vt. 17, the vital facts were that when the plaintiff reached the crossing he found cars upon it waiting to be moved, and attempted to pass between two of them, when by the exercise of ordinary care he might have discovered that an engine was in a position where it could and did run down the track, attach itself to and move the cars before he could swing himself upon the platform. In the present case when the plaintiff reached the crossing, a train was so near, though out of sight, that, as he demonstrated, he could not force his team across after it came within his sight. In other phrase, when he reached the crossing a train was about to pass over it and in the exercise of ordinary care he might have known it.

The plaintiff testified that he was "watching" for a train as he drove along. Assuming that the term implies that he was both looking and listening and that he continued to look and listen until he drove upon the track, his subsequently detailed account of the occurrence shows that he was not watching vigilantly for a train before the action of his horse attracted his attention to it. He could not have watched effectually with his sense of hearing without stilling the noise of his team. Besides, as the track northward could be seen for so short a distance, common prudence required him to make diligent use of his senses to ascertain whether a train was about to pass. *Allen v. R. R. Co.*, *supra*, and cases cited.

An expression of the court in *Carson v. R. R. Co.*, 147 Pa. 219, 30 Am. St. Rep. 727, is fairly applicable here: "It is in vain for a man to say that he looked and listened who walks in front of a moving locomotive." The ruling of the court was correct that the plaintiff's testimony showed that he did not use his eyes and ears vigilantly when he reached the crossing.

Judgment affirmed.

Start and Thompson, JJ., dissent.

IN RE SUSAN PIERPOINT'S WILL.

January Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed April 13, 1900.

Construction of wills—Meaning given to the word “established”—To give effect to the probable intention of a testatrix as gathered from the language of her will, a hospital was held to have been “established” within five years from her death, when, beginning shortly after her death, a movement was started and thereafter carried forward without cessation, which, within the five years, resulted in a charter for its establishment, an organization thereunder, the securing of substantial contributions, the acquisition of a building site and preparations for building, and which, within eighteen months after the expiration of the five years, brought the hospital into actual operation.

APPEAL from a decree of the Probate Court construing certain clauses in the will of Susan Pierpoint, deceased. The Trustees of the Rutland Hospital and the Rutland Missionary Association each claimed the same property by virtue of the clauses in question. Trial by court, Rutland County, March Term, 1899, *Watson, J.*, presiding. Judgment on facts found in favor of the Trustees of the Hospital. The Rutland Missionary Association excepted.

Joel C. Baker and *T. W. Moloney* for the Trustees of the Rutland Hospital.

Henry A. Harman and *George E. Lawrence* for the Rutland Missionary Association.

TYLER, J. This case comes here upon a statement of facts found by the trial court.

The clauses in the will bearing upon the question submitted are as follows :

“I give and bequeath to my beloved sister, Julia Pierpoint, all my estate, real and personal, which I now hold in my own right, and also, all my right and interest both in real and personal

property in the estate of my father, the late Robert Pierpoint of Rutland, deceased, to have and to hold the same to her and to her heirs, executors, administrators, and assigns forever, on the following conditions, namely :

“Provided that my sister, the said Julia Pierpoint, after my death by a will or otherwise, disposes of said property. If not disposed of by her in any way, I wish my executors, whom I hereby name, viz., Henry F. Field and George T. Chaffee, both of said Rutland, to distribute said property as follows :

* * * * *

“The residue of my estate, if any, I give and bequeath in trust to a board of five trustees, two to be appointed by the Congregational Church, one by the Baptist Church, one by the Episcopal Church, and one by the Methodist Church, in said Town of Rutland, to be by said board held and invested, which with the income thereof, is to constitute the nucleus of a fund that is to be applied and used for the benefit of said town in establishing and maintaining a hospital for the sick and lame in said town.

“Any vacancy in said board caused by death or incapacity to act, to be filled by the survivors of said board.

“If within five years after my decease such hospital shall not be established, such residue and the increase and income thereof is to be given to the Rutland Missionary Association to be by them appropriated for the purpose of aiding the poor and afflicted at the discretion of the board of managers of said Missionary Association.”

Susan Pierpoint died February 20, 1890, and her will was probated April 15, 1890. Julia died May 9, 1897, without making any disposition of the property left her by the will, except one hundred dollars paid her by the executor which she used, and a deed of the “Pine Hill” land hereinafter referred to.

On May 8, 1891, a meeting of those interested in the hospital project was held and committees were appointed looking to the establishment of a hospital. At this meeting a provisional

organization was formed, which held meetings from time to time thereafter, until the organization of the "Rutland Hospital" under its charter granted by the legislature and approved November 21, 1892. The organization was on the 15th day of March, 1893.

Just before Julia died, savings bank books of Susan Pierpoint, amounting to some \$1800 were brought to the executors of Susan's will and out of this they paid Julia, immediately, at her request, \$100. Other than these bank books, no part of the property belonging to Susan at her decease, came into the hands of the executors of her will, until after the death of Julia.

On May 3, 1893, Evelyn Pierpoint, a brother of Susan and Julia Pierpoint, and Julia Pierpoint as legatee under Susan's will, by deed transferred to the Rutland Hospital the land on "Pine Hill," so-called, which was owned by Evelyn, Julia, and Susan together, and contained between four and five acres, and later, Evelyn and Julia executed and delivered to the Rutland Hospital a paper extending the time limited in the condition of the deed of May 3, 1893.

The conveyance of this land was accepted by the Rutland Hospital for the purpose and with the intention of locating a hospital thereon, and upon its conveyance an architect was employed who assisted the directors in locating the building, and stakes were driven into the ground showing its location, with the purpose by the directors of proceeding at once with laying the foundation. Some work was done on the land in clearing up briars and brush there growing. The architects were paid \$468.99 for plans of the building. Taxes to the amount of \$50 were paid. A surveyor was paid \$14 for services in locating the building, and he was also paid for other work. The common labor on the lot was given.

Preparations were made for laying out driveways, etc. Chaffee Brothers, in a directors' meeting, offered to give one hundred thousand bricks, of the value of six dollars a thousand,

and the offer was accepted by the directors. These bricks were to be used in the erection of the hospital building.

It was found that there would be difficulty in raising the necessary money with which to erect the building. Some of the directors were anxious to proceed with it, expend what money they then had on hand and trust to subscriptions coming to complete it, but this was thought by others to be unwise. Money could not be raised by mortgage on the property, because, owing to the condition in the deed, no one would take such a mortgage and advance the money thereon. With this condition of things existing, the Rutland Hospital decided to purchase for a hospital, and did purchase on May 5, 1896, the "Sheldon property," so-called, which already had thereon suitable buildings for that purpose.

From the time of the first meeting on May 8, 1891, to September 1, 1896, there was no cessation in the efforts and work of putting the hospital in operation. On the last named date the hospital on the Sheldon property was opened for patients, and has been in active operation ever since. The accumulations of the organization to March 13, 1895, and on hand, as shown by the treasurer's report, were \$13,875.33. Chaffee Brothers gave the Hospital \$1,000 in money in lieu of the one hundred thousand bricks, and this was agreed to by them at the time the Rutland Hospital decided to purchase the Sheldon property. The Pierpoint Pine Hill property was worth \$5,000 for Hospital purposes, but was not worth that sum for any other use.

The Rutland Missionary Association was organized as a corporation in the year 1867, and five years later as a voluntary association, and has ever since been active in doing an extensive charitable work. The testatrix was one of its first members and continued this connection until her death.

It appeared that the different churches named in the will appointed a board of hospital trustees as required by the residuary clause, but not within five years from the testatrix' decease.

It is evident that the testatrix did not expect that her bequest would enable the trustees to build and furnish a hospital, but that it and the interest thereon would be a nucleus to attract gifts and bequests until a fund sufficient for the purpose was created. The language of the will is, " * * * to constitute the nucleus of a fund that is to be applied and used for the benefit of said town in establishing and maintaining a hospital, * * * ." The will did not make it the duty of the trustees to obtain other funds. The testatrix anticipated that voluntary contributions would be made, and it may be true, as contended by the defendant, that she intended to require that they should be made so that the hospital should be completed within five years, and to provide that otherwise the bequest should fail. But the more reasonable interpretation of the will is, that the trustees should within that time take such action in establishing a hospital as would assure its final completion for the purpose named, and that the bequest should then take effect. This construction is aided by the fact that the bequest was not available until the death of Julia, nor then, if Julia in her life-time elected to dispose of the property herself, and it is not presumable that Susan assumed that her sister would not continue in life more than five years after her own decease.

If the defendant's construction of the will were adopted, then the fact that Julia survived the testatrix more than five years defeated the bequest, unless the trustees completed a hospital and made it ready for use within that time with funds contributed by other persons in reliance upon the uncertain event of Julia's not disposing of the entire estate. If the testatrix had intended such a conditional bequest we think she would have employed more apt words to express it. It was the testatrix' evident intention to aid in establishing a hospital, not to require one to be completed by other means before her property should be available. It would be inconsistent with her expressed wish that her bequest should be the nucleus, the center, the beginning

of a fund, to construe the will to mean that the bequest should be an addition to such a fund. Her intention was to inaugurate a movement that would result in a hospital, not merely to aid in maintaining one after it was established.

Although the testatrix may have been greatly devoted to the Missionary Association, she gave a hospital the preference in her will. It must be considered that she desired its establishment and the application of her estate to it upon the conditions named. Such a hospital as she desired was provided and opened for the reception of patients about eighteen months after the expiration of five years from her decease. If no decisive steps had been taken within the five years the bequest would have been lost for that purpose.

But the various measures that were taken by the trustees, from the meeting in May, 1891, down to the end of five years from the death of the testatrix—which the court below found were continuous—amounted to an establishing of a hospital within that time. The obtaining a charter, the organization of the “Rutland Hospital” under it, the various meetings, the taking of a deed of the “Pine Hill” land and the work done upon that location, and the receipt of various contributions, all resulted in the purchase, equipment and opening of the Sheldon property as a hospital. These steps taken within five years amounted to the establishing of a hospital according to the intention of the testatrix so far as her intention can be ascertained from the language of the will.

Judgment affirmed.

STATE OF VERMONT v. ERNEST MASSEY, B. G. HOWE, AND FIRST
NATIONAL BANK OF ST. JOHNSBURY AND HENRY MASSEY.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, START AND WATSON, JJ.

Opinion filed April 13, 1900.

Chancery—Practice under Rules 15 and 17—Discretion of chancellor upon overruling demurrer—When a demurrer, incorporated into an answer to a bill in chancery, is heard and overruled, and the demurrant does not ask leave to withdraw it, nor to waive it and go to trial on the merits, but asks to have the answer brought forward, and to have the benefit of the demurrer reserved to him till final hearing, the question of whether or not such benefit shall be so reserved rests entirely in the discretion of the chancellor. It is within his discretion to decide whether or not the defendant shall have the benefit both of an admission and of a denial, before the case is passed to the Supreme Court.

Considerations guiding discretion—Practice in Supreme Court on sustaining a decree overruling a demurrer—It is the practice of the Supreme Court, upon sustaining a decree overruling a demurrer, to remand with leave to answer over, and this practice bears upon the wisdom of a chancellor in refusing the benefit of both an admission and a denial before the case is passed to the Supreme Court.

Considerations guiding discretion—Construction of new statute—That a bill is brought to enforce a new statute which requires a construction by the Supreme Court, tends to show the exercise of a wise discretion on the part of the chancellor in sending the case to the Supreme Court for determination upon questions of law raised by a demurrer, before a trial upon the issues of fact is had.

Considerations guiding discretion—Statutory duty of Supreme Court—In the exercise of such discretion the chancellor may well consider that the statute makes it the duty of the Supreme Court, upon hearing and determining a chancery appeal, to affirm, reverse or alter the decree as justice requires, and then to remand to the Court of Chancery.

Chancellor's discretion analogous to that of County Court under V. S. 1629—Such exercise of discretion on the part of the chancellor as results in the determination of questions of law before a case is heard upon its merits, is analogous to the exercise of the discretion of the County Court under V. S. 1629, in passing a cause to the Supreme Court before final judgment.

Construction of No. 90, Acts of 1898—Discretion of state's attorney—No. 90, Acts of 1898, in providing that the owner of, and all persons interested in a building alleged to be maintained as a liquor nuisance may be joined with the keeper in proceedings in equity, is not mandatory, but leaves it to the discretion of the state's attorney whether to join the owner and other parties interested or not.

Construction of No. 90, Acts of 1898—When owner should be joined—Allegation of knowledge necessary—No. 90, Acts of 1898, is construed to mean that the state's attorney should exercise his discretion to make the owner of the building or premises alleged to be a nuisance a party to the proceeding, when he has reason to believe that the owner had knowledge of the existence of the nuisance. In case the owner is joined there must be an allegation of his knowledge in the information.

When owner should be enjoined—Liability for costs—If, under a proper allegation, the owner is joined, and on hearing it is adjudged that he knew, or under the circumstances had reason to suppose, that his property was being used for the unlawful purposes charged, an injunction should be granted against him, and he should be liable for costs.

When owner should not be enjoined—Landlord's liability for nuisance same as at common law—Unless knowledge or ground of knowledge on the part of the owner is alleged and proved, he is not liable to an injunction. The liability of the landlord for a nuisance maintained by his tenant stands under the statute as it stood at common law.

Scope of injunction against owner—If the owner is enjoined, the injunction should be upon his entire building. His knowledge implies assent, since it gives him power to terminate the tenancy; and if he assented to the existence of the nuisance in one room of his building, that being abated, it would be likely to appear in another.

Scope of injunction against keeper only—If the injunction is against the keeper only it should operate only upon such rooms as are in his occupancy or under his control. In this case the injunction against the keepers is construed to extend to no other parts of the building in question than the rooms occupied by them.

Injunctions against persons other than owner and keeper—Mortgagees—Allegations and proof of right of possession or control necessary—Persons other than the owner and keeper having an interest in the premises cannot be enjoined without allegations and proof of the right of possession or control. A mortgagee cannot be enjoined without such allegations and proof.

Allegation of continuance of nuisance not necessary—An information under the act in question need not allege a continuance of the nuisance to the time when the information is filed.

BILL OF COMPLAINT brought to the Court of Chancery for Caledonia County by the State's Attorney for said County. The defendants, Ernest Massey and Henry Massey, did not appear, and as to them the bill was taken as confessed on such default. The defendants, B. G. Howe and the First National Bank of St. Johnsbury, filed their answer and therein incorporated their demurrers. The cause was heard on said demurrers at the June Term, 1899, before *Thompson*, Chancellor, who overruled the demurrers and adjudged the bill sufficient. The demurrants thereupon moved to have the benefit of their demurrers reserved to them till final hearing, and to have their answer brought forward for hearing. This motion was denied and it was considered and adjudged that as to them the bill be taken as confessed. It was further adjudged and decreed that the common nuisance, set forth in the complaint, had been kept and maintained as therein alleged, and that each and all of said defendants, and each of their servants, lessees, tenants and assigns be perpetually enjoined from keeping and maintaining such nuisance and from suffering it to be maintained. It was further decreed that the answering defendants pay costs of suit, except the cost of service of process on the defaulted defendants. The defendants Howe and said Bank appealed.

The bill of complaint was filed May 24th, 1899, and charged that certain rooms in the St. Johnsbury House, so called, were kept and maintained as a liquor nuisance by its occupants, the defendants Ernest Massey and Henry Massey, that the defendant B. G. Howe was the owner of said house, and that the said Bank had an interest therein as mortgagee. A conviction at law of the defendant, Ernest Massey, before the bringing of the bill was alleged.

The bill contained no allegation of knowledge on the part of the answering defendants. It prayed for the injunction granted by the Chancellor.

Leighton P. Slack, State's Attorney and *Alexander Dunnett* for the State.

Henry C. Ide and *Harry Blodgett* for the defendants, B.G. Howe and First National Bank of St. Johnsbury.

TYLER, J. I. The decision of one question in this case, which has been discussed at considerable length by counsel for the defendants, must depend upon the practice that should prevail under rules 15 and 17 in chancery. Rule 15 reads :

“Instead of filing a formal plea or demurrer, the defendant may insist in his answer on any special matter that goes to the merits of the bill, and have the same benefit thereof as if he had pleaded the same or demurred to the bill.”

Availing themselves of this rule, the defendants Howe and the First National Bank filed their answer and incorporated therein a demurrer. The legal effect of the demurrer was the admission of the truth of all the well pleaded facts set forth in the information. The demurrer, in the usual form, denied that the complainant had made such a case as entitled it to the discovery or relief sought, demanded the judgment of the court whether the defendants should be compelled to make any further answer, and insisted upon this special defense in accordance with said rule 15.

The information was taken as confessed as to the defendants Massey, they not appearing, but as to the defendants Howe and the First National Bank the case was heard upon their demurrer, and after consideration of the arguments of the respective counsel, the Chancellor adjudged that the demurrer be overruled and that the information was sufficient. Upon the rendering of this decision, the defendants Howe and the First National Bank moved to have the benefit of their demurrer reserved to them till final hearing, and to have their answer brought forward for hearing, which motion was denied, the information was taken as confessed, and it was adjudged, “that such common nuisance had been kept and maintained as alleged in said information, and it is considered and decreed that each and all of said defendants, and their and each of their servants, agents, lessees, tenants

and assigns, be, and they and each of them are, perpetually enjoined from keeping and maintaining such nuisance and from suffering it to be maintained in said building and land, described in said bill of complaint.”

The defendants elected to stand upon their demurrer, “insisted upon this special defense,” and brought the case to a hearing upon the issue thus made, whether, admitting all the allegations in the information, the orator was entitled to an injunction.

The situation was not a novel one under our present rules of practice in chancery. The defendants had acted in accordance with what this court said in *Westminster v. Willard*, 65 Vt. 266,—that under the former practice, when the demurrer was contained in the answer, it was not brought on until the whole case was heard on the merits, but that under the new practice the demurrer must be brought on before the case is heard on the merits, otherwise it is waived. The demurrants in this case evidently acted in pursuance of the later practice. In the case above cited, the court, after referring to the former practice, that when a demurrer to the whole bill was overruled the defendant was ordered to answer, and the court might and often did reserve the right to raise the same question at the hearing, said, quoting in substance the 17th rule in chancery:

“But under the new rules in chancery, when a demurrer is overruled the bill should, regularly, be taken as confessed, and the matter thereof be proceeded with and decreed accordingly; if it can be done without an answer and is proper to be decreed; but if a discovery is required to enable the complainant to obtain a proper decree, the defendant will be ordered to answer as far as necessary for that purpose.”

It cannot be claimed, and is not insisted upon in the briefs, that a discovery was required to enable the complainant to obtain a proper decree. The demurrer was to the whole information and to the sufficiency of its allegations. The demurrants were not without rules for their guidance when the demurrer was overruled. The court further said in *Westminster v. Willard*

“There are several ways open to the defendant when his demurrer is overruled. He may let the bill be taken as confessed under the rule and take the case up on demurrer ; or he may ask leave to withdraw his demurrer, or to waive it, and to go to trial on the merits ; or he may ask to have the benefit of the demurrer reserved to him till the hearing. If it is reserved, the better practice would be, of course, to make a special order to that effect, and not to leave the matter to implication.”

The demurrants did not ask leave to withdraw their demurrer, nor to waive it and go to trial upon the merits—which request is usually granted—but they did request to have their demurrer brought forward for hearing, and that the benefit thereof might be reserved until the hearing. Whether or not such benefit should be reserved rests entirely in the discretion of the chancellor, as is indicated in the words, “if it is reserved,” in the paragraph last quoted.

The defendants, in the first instance, staked their case upon their demurrer, and insist in this court that the demurrer should have been sustained and the allegations in the information adjudged insufficient, and yet they insist here that as a matter of right, they should have been allowed a trial upon the merits—that they should have been permitted both to admit the facts alleged and to traverse them.

It rested entirely within the discretion of the Chancellor to decide whether the defendants should have the benefit both of an admission and a denial of the facts alleged before passing the case to this court, and we think that this discretion was wisely exercised, especially in view of the fact, that it is the practice in this court, upon sustaining the decree of the court below, overruling a demurrer, to remand the case with leave to the demurrant to answer over. It was said in *Stewart v. Flint*, 57 Vt. 216, that when a demurrer is overruled, it is discretionary with the court to remand the case for trial, or for final decree ; but it will not remand for final decree without exceptional circumstances.

If the Chancellor who made this decree had been sitting as presiding judge in the County Court, and exceptions had been taken and filed in a cause, he might, in his discretion, under V. S. 1629, have passed the cause to this court before final judgment, for hearing and determination on the exceptions. This statute is often availed of, as the profession is aware, to have questions of law determined before subjecting the parties to the expense of a trial in the County Court.

As this bill was brought to enforce a new statute which required a construction by this court, the Chancellor may well have considered it advisable and in the exercise of a wise discretionary power to send the case here for hearing and determination upon the questions of law raised by the demurrer before the expense of a trial upon the issue of fact made by the answer and replication was incurred. The statute gives the right of appeal to the defendants and enjoins upon this court the duty to hear and determine the appeal and to affirm, reverse or alter the decree, as justice requires, and then to remand the case to the Court of Chancery. V. S. 981-985.

II. The Act of 1898 provides that the owner of and all persons interested in the building, as well as the keeper, "may be" made parties to the proceedings. The statute is not mandatory; it is left to the discretion of the state's attorney whether to join the owner and others as parties or not. If the legislature had intended that they *should* be joined in every case it may be assumed that it would have said so in unmistakable terms. Then the question is, when should the state's attorney, in the exercise of this discretion, join the owner as a party? To answer this question it is necessary to understand the *status* of the law relative to the respective liabilities of the keeper and owner prior to the enactment of 1898. No. 14, Acts of 1880, defined liquor nuisances substantially as defined in V. S. 4512. It provided for punishing the keeper and closing the place. It gave the owner the right to re-take his premises when used for such unlawful purpose, and provided a penalty upon his conviction of

knowingly letting them for that purpose. V. S. 4518, 4519. The keeper was made liable to a penalty by the fact that he *was* keeper; the owner, only when he knowingly let his premises for the unlawful purpose.

By No. 46, Acts of 1888, it was provided that upon such conviction any chancellor should have jurisdiction in equity, and that he should issue an injunction against the keeper upon his conviction of keeping a nuisance, while the liability of the owner, down to 1894, remained as provided in the Act of 1880.

By the Act of 1894, No. 68, V. S. 4526, it was first provided that parties interested in the real estate where the nuisance was maintained, as well as the actual parties to the nuisance itself, should be notified to appear in the Court of Chancery or before a chancellor in proceedings for a temporary injunction to abate liquor nuisances, which are defined in V. S. 4512 to be saloons, restaurants, groceries, cellars, shops, billiard halls, bar-rooms, drinking places or rooms used as places of public resort, and all buildings and erections of whatever kind, or the ground itself where intoxicating liquor is unlawfully sold, furnished, or given away, or kept for such unlawful purpose. The Act of 1898, No. 90, is more specific and provides that, "the owner and all persons interested in the building or premises in which such common nuisance has been kept and maintained, as well as the keeper, may be made parties to the proceedings." It further provides that, "if it is finally adjudged that such common nuisance has been kept and maintained or suffered to be maintained, the defendants, their servants, agents, lessees, tenants, and assigns shall be perpetually enjoined from keeping and maintaining such common nuisance or suffering it to be maintained in such building or premises or in any part thereof."

The important question here is whether the owner is liable to an injunction without being "adjudged" to have had knowledge of the unlawful use of his premises, and whether he can be properly joined as a party to the proceedings without an allegation in the information of such knowledge. The defendants

contend that the owner should not be joined without an allegation of his guilty knowledge; that the Act does not require it, but that the word "may" gives permission to join the owner upon the allegation of sufficient facts to warrant it.

It is apparent that the Acts of 1894 and 1898 were especially aimed at the places which former statutes had pronounced common nuisances. The former did not provide for making other "parties interested" parties to the proceeding, but the latter warrants the joinder of the owner and all persons interested in the building or premises, as parties. The injunction, if granted, is broader in its scope than it was by the former Act, for it enjoins the defendants and the other persons named in the Act from maintaining or suffering such nuisance in the building or premises, and the injunction is at once made perpetual.

The Act of 1898 gives the state's attorney authority to make the owner a party, and it is difficult to conceive in what circumstances this discretion should be exercised other than when there is ground for belief that the owner knew of the unlawful purpose for which his premises were being used, and in such case there should be an allegation in the information of such knowledge. If this fact is alleged and proved the owner remains liable to the penalty under V. S. 4519, and he is also liable to injunction. The law would operate unjustly upon the owner, if his entire hotel or other building were stamped as a nuisance, and an injunction were issued against it and recorded in consequence of the unlawful act of a tenant, committed without his knowledge—an act which, if known to him, he would have disapproved. A tenant might secretly convert a room in a business or other block into a drinking nuisance during the temporary absence of the owner from sickness or other cause, and in violation of an express condition in the lease. *State v. Price*, 92 Ia. 87, was in some respects such a case.

The Iowa Code, 2348, provides that, "Whoever shall erect, establish, continue or use any building or place for the unlawful manufacture, or sale, or keeping with intent to sell * * * intoxi-

ating liquors, shall be guilty of nuisance." Under this section the Iowa court has uniformly held that the owner could not be adjudged guilty and made liable to injunction without knowledge that his building was being kept for the unlawful purpose, and some of the cases hold that he must not only have knowledge but that his assent must be shown. *Martin v. Blattner*, 68 Ia., which is relied upon by the State, is not in point, for there the owner leased the property to the vendor of liquors, and refused to exercise his right to forbid the traffic and oust the violator. Knowledge was therefore implied, and the owner was justly held to be an aider and abettor of the traffic. In *State v. Price, supra*, it was held that the owner, not having permitted the unlawful act and having no knowledge of it, should not have been enjoined and held for costs.

It would be in accordance with the reason of the Iowa decisions to hold that the owner should not be made a party without an allegation in the information that he had, or, in the circumstances ought to have had knowledge of the existence of the nuisance upon his premises.

The information contains no allegation that either Howe or the Bank had committed an offense, nor that, in the exercise of reasonable care over their building, in the circumstances, they ought to have known that an offense therein was being committed by other persons. There is no reason to suppose that the legislature intended to depart from the rule of the common law which would not subject a landlord to the consequences of his tenant maintaining a nuisance without the landlord being chargeable with notice of the existence of the nuisance.

It is said by the counsel for the State that this is a civil proceeding; that the decree merely fixes the *status* of the property; that an adjudication that a building is a nuisance can only diminish its value by so much as its value has been enhanced by the unlawful use, and that an injunction only restrains the owner from suffering his building to be used for an unlawful purpose. It is true, however, that while the adjudication does not convict

the owner of crime, it casts odium upon him by reason of an unlawful act of another person, committed without his knowledge or fault. He is made a party to the information and to the decree, and is enjoined without having violated the law himself or being chargeable with knowledge of its violation by his tenant, and the injunction compels him to be a guarantor that his tenant shall not violate the law in the future.

The Act of 1898 must be construed to mean that the state's attorney should exercise his discretion to make the owner of the building or premises a party to the proceeding when he has reason to believe that the owner has knowledge of the existence of the nuisance. On the hearing, if it is adjudged that the owner had such knowledge, or, in the circumstances, he had reason to suppose that his property was being used for the unlawful purpose, an injunction should be granted against him as well as against the keeper, and he should be liable for costs. On the other hand, if the judgment is in his favor upon this question, he should be discharged. If the owner is enjoined, the injunction should be upon his entire building, because if he had knowledge of the nuisance his assent to it is implied from the fact that under the law he had power to terminate the tenancy. If he permitted the nuisance to exist in one room in the building, that being abated, it would be likely to appear in another room. If the injunction is against the *keeper* only it should operate only upon such rooms as are in his occupancy or under his control, and it should issue against such persons only as have power to control the tenement and abate the nuisance, though others may have an interest in the building.

The Bank as mortgagee could in no event be liable to an injunction, there being no allegation in the information that it had possession, or any right to the possession or control of the property.

We therefore hold—there being no allegation in the information of knowledge on the part of the defendant Howe and the First National Bank that the premises were kept for an unlawful

use—that those defendants were improperly made parties to the proceeding.

III. The information is not defective by reason of its omission to allege a continuance of the nuisance to the time the information was filed. By V. S. 4523 the state's attorney is required immediately upon conviction of the keeper to file an information with the chancellor, setting forth the keeping of such nuisance and such conviction; and yet he is not to be held in default of his duty if he files the information at any time within thirty days after such conviction. The keeper may have discontinued the nuisance within that time, but it is nevertheless the state's attorney's duty to file the information. Section 4524 provides that upon hearing, unless cause is shown, the chancellor shall issue an injunction restraining and enjoining such convicted person, his agents, servants and attorneys from longer maintaining such nuisance under penalty of being in contempt of court.

IV. Defendants further insist that the injunction upon the entire hotel building as to the defendants Massey was unnecessary and inequitable. The information only alleges that intoxicating liquors were unlawfully kept for sale, etc., by them in the billiard and pool rooms to the common nuisance of the public, and counsel for the State, in their arguments, construed the decree to extend to no other part of the building than the rooms occupied by the defendants Massey, and we give it that construction.

The other questions raised in the argument were settled in *State v. Murphy*, 71 Vt. 127. See also *Carlton v. Rugg*, 149 Mass. 550.

Decree affirmed as to defendants Ernest Massey and Henry Massey; reversed and demurrer sustained as to defendants B. G. Howe and the First National Bank of St. Johnsbury, and the information as to them adjudged insufficient; cause remanded.

STATE v. F. A. ALLISON ET AL.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, START, and WATSON, JJ.

Opinion filed April 2, 1900.

State v. Massey—The opinion in the preceding case of *State v. Massey* is applicable to this case.

BILL OF COMPLAINT brought to the Court of Chancery for Caledonia County by the State's Attorney for said County. All of the defendants answered and incorporated a demurrer into their respective answers. Before any orders were made in the case the defendants moved for a trial by jury upon the issues of fact. The cause was heard on said demurrers and on the motion for a trial by jury at the June Term, 1899, before *Thompson*, Chancellor, who denied said motion, overruled the demurrers and adjudged the bill of complaint sufficient. Thereupon the defendants moved to have the benefit of their demurrers reserved to them till final hearing, and to have their answers brought forward for hearing. This motion was denied and the bill taken as confessed as to all of the defendants. It was further adjudged and decreed that the common nuisance, set forth in the complaint, had been kept and maintained as charged in the bill and that the defendants and each of their servants, agents, lessees, tenants and assigns be perpetually enjoined from keeping and maintaining such nuisance and from suffering it to be maintained, and that the defendants pay costs. The defendants appealed.

The bill of complaint was filed May 25, 1899, and charged that certain rooms in a building in St. Johnsbury, owned by the defendant Bank and Trust Company, were kept and maintained as a liquor nuisance by its occupants, the defendants F. A. Allison and Campbell Davie. The bill of complaint in this case did not allege a conviction at law of the occupants, or of either of them prior to the bringing of the bill. It contained no allegation of knowledge on the part of the Citizen's Bank and Trust Company.

The bill prayed for the injunction granted by the Chancellor.

Leighton P. Slack, State's Attorney, and *Alexander Dunnett* for the State.

Bates, May & Simonds and *Harland B. Howe* for the defendants.

MUNSON, J. It is not claimed but that a temporary injunction may issue against a tenant prior to conviction, and it has been held in *State v. Massey*, herein reported, that an injunction cannot issue against an owner not charged with knowledge. The case is therefore disposed of upon the opinion in the case named.

Decree reversed pro forma as to defendants F. A. Allison and Campbell Davie; reversed and demurrer sustained as to defendant Citizens Savings Bank and Trust Co., and the information as to it adjudged insufficient; cause remanded.

STATE v. HENRY SCHOOLRAFT.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed March 9, 1900.

*Practice in the Supreme Court—Abandoned and new points—*When the points made in the court below are abandoned, and points not there made are alone urged, there is nothing for the consideration of the Supreme Court.

INDICTMENT by virtue of V. S. 2703 and 2704. Those sections were not, however, in terms, referred to in the indictment. Heard on demurrer to the indictment, Washington County, September Term, 1899, *Watson, J.*, presiding. The demurrer was overruled and the indictment adjudged sufficient. The re-

spondent excepted, but, without prejudice to his exception, pleaded guilty. Judgment rendered on plea, sentence passed, and mittimus issued.

The indictment set out, among other things, that at the September Term, 1896, of the Franklin County Court, the respondent's lawful wife, Delia, was granted a divorce from the respondent, and that afterwards on the 8th day of February, 1899, at the City of Barre in the County of Washington, while the said Delia was alive, and while the decree of divorce so granted was in force, the respondent was married to one Ann Suitor, and that thereafter, and until May 16th, 1899, and while the said Delia was alive, the respondent and the said Ann lived and cohabited together as man and wife in the Town of Barre in said County of Washington.

Richard A. Hoar, State's Attorney, for the State.

Edward H. Deavitt for the respondent.

MUNSON, J. In the court below the respondent claimed that the indictment was defective for the reason that "it did not particularly in terms refer to sections 2703 and 2704 of the Vermont Statutes," and for the further reason that it did not set forth that the decree of divorce remained in effect at the time of the cohabiting. These points are not now urged. The points which are urged were not made in the court below, and therefore cannot be considered.

Judgment that there is no error in the proceedings and that the respondent take nothing by his exceptions.

WILLIS V. FARR v. GEORGE C. BRIGGS' ESTATE.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and
WATSON, JJ.

Opinion filed April 13, 1900.

*Corporations—Statutory liability of directors—When liability is contractual rather than penal—When right of action is transitory—*Under a statute making such directors of a corporation as assent to the creation of debts beyond a prescribed limit liable to the creditors for the debts so created, the liability of the directors when it arises is contractual and not penal in its nature, and the right of action to enforce it is transitory and can be brought in any court of competent jurisdiction in any state.

*Liability how contractual—Liability analogous to that of sureties and guarantors—*Under such a statute the liability arises out of the assent to contracts creating debts beyond the prescribed limit, and is similar to that of sureties and guarantors.

APPEAL from the decision of commissioners on the estate of George C. Briggs, deceased. To the plaintiff's declaration a general demurrer was filed. Demurrer sustained *pro forma* and without hearing, Chittenden County, September Term, 1899, Rowell, J., presiding. The plaintiff excepted.

The defendant claimed as grounds of demurrer that the liability arising on the statute of South Dakota in question was so far penal that it could not be enforced in this State, and that the right of action to enforce it did not survive.

W. L. Burnap and Powell & Powell for the plaintiff.

Clark C. Briggs and Seneca Haselton for the defendant.

TYLER, J. Appeal from the disallowance of a claim by the commissioners upon the estate. The following are the material facts alleged in the declaration and admitted by the demurrer:

The Vermont Investment Company was a corporation created and organized in May, 1882, under the laws of South Dakota, and having offices and places of business in that State

and in Burlington, Vt., for the negotiating of loans and the sale of promissory notes and other securities.

The statute under which the corporation was created contains the following provision :

“ The directors of corporations must not make dividends except from the surplus profit arising from the business thereof; nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock ; nor must they create debts beyond their subscribed capital stock, or reduce or increase their capital stock, except as especially provided by law. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen), are, in their individual and private capacity jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted ; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section.”

The capital stock issued and subscribed for was five hundred and twenty-three shares of the par value of one hundred dollars per share ; yet the directors contracted debts and liabilities against the corporation largely in excess of the stock subscribed.

George C. Briggs of Burlington was a stockholder in the corporation, was duly constituted a director thereof and qualified and acted as such while it continued to do business. He attended its meetings, participated in its transactions, expressed no dissent to the creation of debts as aforesaid and caused none to be entered upon its records.

The corporation sold to the plaintiff in this State and guaranteed the payment of various notes to a large amount, and thereby became liable to pay the same to him at maturity if the makers failed to pay them.

The plaintiff demanded payment of the notes and obligations so purchased by him, as they respectively fell due, of the makers, and upon failure of payment by them, made demand of payment of the corporation pursuant to its guaranty. The corporation became insolvent and was dissolved in December, 1893, and all its assets were exhausted, whereupon the plaintiff presented his claim against Briggs' estate upon the ground that, as one of the directors of the corporation, by virtue of the statute, Briggs became liable to pay him the amount of his debt against the corporation and that the claim survived against his estate.

The statute of South Dakota evidently was the general law of that State under which all business corporations were required to be organized. Upon the election of the directors they became subject to all its requirements and liable to the corporation and to its creditors, within that State at least, for a violation thereof. The question is whether the statute had any extra-territorial force—whether creditors outside the limits of that State have any remedy by virtue of its provisions.

It is well settled that penal statutes will receive no recognition and are not enforceable in other states than the ones in which they were enacted. Story on Conf. Laws, secs. 620, 621; *Halsey v. McLean*, 12 Allen 439, 90 Am. Dec. 157 and notes; *Blaine v. Curtis*, 59 Vt. 120; *Adams v. R. R. Co.*, 67 Vt. 76. The plaintiff concedes this to be the rule of law, but contends that the statute under which the present action is brought is not penal, but contractual. The defendant estate claims that the statute is strictly penal.

Statutes similar to that under which the present action is brought, making the directors of business corporations personally liable for their default in the performance of certain prescribed duties, have received much consideration by law writers and courts. In Cook on Cor. sec. 223, in Morawetz, sec. 907, and in Thompson, secs. 3052 and 4164, it is said that such statutes have generally been held to be penal. Courts of high authority have so held. In *Bank v. Price*, 33 Md. 488, a Pennsylvania statute

which provided that, if any debts or liabilities should be contracted exceeding the amount of the capital stock of the corporation actually paid in, the directors and officers contracting the same should be jointly and severally liable in their individual capacity for the whole amount of the excess, and that the same might be recovered in an action of debt, was considered as imposing a penalty, and that it could only be enforced in the state which enacted it. In *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146, the same doctrine was held under the statute of another state which provided that officers of certain corporations should be personally liable for the debts of the corporation in case they neglected to file an annual report showing the financial condition of the corporation. See, also, *Stokes v. Stickney*, 96 N. Y. 323; *Carr v. Rischer*, 119 N. Y. 117. The same was held in *Derrickson v. Smith*, 27 N. J. L. 166; in *Diversey v. Smith*, 103 Ill. 375, 40 Am. Rep. 4; and in *Chase v. Curtis*, 113 U. S. 452.

In *Huntington v. Attrill*, 146 U. S. 657, the court gave construction to a New York statute, in violation of which the defendant, as a director of a business corporation, signed and made oath to a certificate which he knew to be false—that the whole of the capital stock of the corporation had been paid in, when in fact no part of it had been paid in. The statute made him liable for all the debts of the corporation, which included that of the plaintiff. The question whether this was a penal statute, having no force out of the state where enacted, was elaborately discussed by the court and this statement of the law was laid down:

“The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.”

The court held that the act was in no sense criminal or *quasi* criminal; that it made the stockholders individually liable

for the debts of the corporation until the capital stock was paid in and a certificate was filed, and made the officers liable for any false and material representation in the certificate ; that the individual liability of the stockholders takes the place of a corporate fund until that fund has been duly created, and that the individual liability of the officers takes the place of the corporate fund, in case their statement that it has been duly created, is false ; that the statute gives a civil remedy at the private suit of the creditor only, and measured by the amount of his debt, it is as to him, clearly remedial ; that to maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under the laws to an individual ; that it is not a penal law in the sense that it cannot be enforced in a foreign state or country.

In *Neal v. Moultrie*, 12 Ga. 104, the charter of a bank provided that the total amount of the debts which the corporation should at any time owe should not exceed three times the amount of stock paid in, and made the directors liable for such excess ; *held*, that, as a right of action and recovery was given to individuals, or a particular class of individuals, the act was remedial and not penal. The court remarked that the act not only looked to the interests of the public at large ; but, "it was also a measure of individual security which created rights in individual citizens."

In *Witters, Receiver, v. Foster, Admr.*, 26 Fed. R. 737, cited by defendant, which was a bill of revivor, the original bill charged the intestate, with other directors of a bank, with neglect of duty in not requiring a bond of the cashier, in allowing persons to become indebted to an amount exceeding one-tenth of the capital, and in reckoning assets as good as a basis of dividends, when they were worthless, etc., in violation of United States statutes. These statutes gave no remedy to the creditors or stockholders, and the court held that the ground of the orator's claim was the personal and official guilt of the intestate, for the omission of duties which, had they been performed, might have

benefited the assets of the bank, and that the cause of action did not survive. The same court, Wheeler, J., in an action to enforce the personal liability of directors of a corporation under a Vermont statute, which provided that the corporation should not contract debts exceeding three-fourths the amount of its capital paid in, and made the stockholders and directors personally holden to the creditors, if the indebtedness should exceed that amount, held that the directors' liability for the debt arose out of the assent to the contract creating the debt and was that of contracting debtors, and clearly drew the distinction between such a statute and one that declared liability for some act or neglect in no way connected with the contracting of debts, as for neglect to file reports, which the court said was penal. *Field v. Haines*, 28 Fed. R. 919. See, also, *R. R. Co. v. Graves*, 80 Fed. R. 588, where this distinction is maintained; Cook on Cor. sec. 1; Thomp. on Cor. secs. 4166, 8525-6; Mor. on Cor. sec. 908.

The defendant cites *Wind. Prov. Inst. v. Sprague et al.*, 43 Vt. 502, which arose under the same statute as *Field v. Haines* and to enforce a similar liability. The court used the expression that, "the creation of this additional liability seems to have been intended as a check upon the directors and stockholders in the contraction of debts, and to have been imposed, in some sort, as a penalty * * *". It also said, "to visit this penalty upon any others than those who caused the infraction of the charter would be manifestly unjust," etc. The word penalty may have been used inadvertently; it clearly was used in no other sense than that a party should make pecuniary payment for the breach of his contract.

Cady et al. v. Sanford et al., 53 Vt. 632, was a case against the defendants as directors of a corporation organized under the laws of this State, which made them personally liable for debts contracted before publishing the articles of association. The liability of the directors was treated as contractual, though the case was decided for the defendants upon the ground that their

liability was only collateral to that of the company, and that no debt against the company had been established.

Blaine v. Curtis, 59 Vt. 120, was an action to recover a penalty imposed by the statute of New Hampshire for taking unlawful interest. The statute was held to be penal, but the court said: "If it only gave a remedy for an injury against the person by whom it was committed to the person injured, and limited the recovery to the mere amount of loss sustained, or to cumulative damages as compensation for the injury sustained, it would fall within the class of remedial statutes." This is the rule laid down in *Boies v. Booth*, 2 W. Bl., "that where the damages are given wholly to the party injured, as compensation for the wrong and injury, the statute, having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so called, but remedial."

It appears by the cases above referred to that it was the doctrine of this court long before *Huntington v. Attrill* was decided, that where the purpose of a statute is to furnish a remedy to creditors who have been injured by the directors' violation of the requirements of the statute, the liability of such officers is contractual, and actions upon such statutes are transitory and can be brought in any state in courts of competent jurisdiction.

Some of the decisions by courts of other states in which a different doctrine has been held have been rendered upon statutes not containing the remedy for creditors, which is expressly provided in the South Dakota statute. That statute clearly is not penal either in its letter or intent, but it grants a right of action to private persons who have suffered pecuniary injury in consequence of certain officers of corporations violating the statute, to recover damages of those officers, the extent of whose liability is the amount of pecuniary loss sustained by such private persons—creditors of the corporation. No public wrong was committed when the directors exceeded the prescribed limit in creating debts. The creditors were the only persons upon whom a wrong was committed, and they have a remedy by virtue of the

quasi contract which the directors entered into with them when the sales of securities were made, to the effect that the directors were not exceeding the prescribed limits in creating debts. The obligation which the statute imposed upon the directors not to create debts beyond a certain limit entered into the contracts of sales of securities which the directors made through their agents. The directors created the debt in this jurisdiction, and the statute of the sister state fixes the extent of their liability, which does not arise from their personal misconduct merely irrespective of its effect upon the property rights of others, but, as was said by the court in *Field v. Haines, supra*, "the liability arises out of the assent to the contract creating the debt." As was said in *Wind. Prov. Inst. v. Sprague, supra*, in respect to directors: "They can keep the indebtedness of the company within the limits fixed by the legislature, or they can extend that indebtedness beyond that limit and voluntarily take upon themselves the relation of joint debtors to the creditors of the company." The liability is similar to that of sureties and guarantors, and evidently was imposed partly for the purpose of inducing the directors to perform their prescribed duties, and partly as a means of securing the creditors of corporations from losses occasioned by the acts of their officers.

Pro forma judgment reversed; demurrer overruled; declaration held sufficient; cause remanded.

ELENORA D. CURTIS ET AL. v. JOHN R. SIMPSON ET AL.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, THOMPSON and WATSON, JJ.

Opinion filed April 19, 1900.

Real estate of wife—Marital rights of husband—"The wife's equity"—A conveyance of real estate to a wife must contain specific words of

exclusion to shut out the husband from his marital rights in respect thereto, but a court of equity will provide a competent support for a wife from real property that comes to her in her own right, although under the terms of the conveyance to her it is not held to her sole use.

*Ante-nuptial agreement—Post-nuptial agreement—Equivalent facts—*Not only may an express ante-nuptial agreement, or an express post-nuptial agreement made upon sufficient consideration and for sufficient reasons, disembarass the wife from marital restraint in respect to the disposition of her real estate, but other facts may put the husband in the same relation to such real estate as an express agreement made before or after marriage, and give the wife, in equity, the right to charge it for her own benefit the same as if she were discovert.

*Non-existence of reasons for marital rights—Cessation of rights themselves—Conveyance by wife without joinder of husband—*In this case the husband's long continued separation from the wife, and total failure to support her, and his support by her, and other facts reviewed in the opinion, showed the reasons for the marital rights of the husband in his wife's real estate to have failed, and the rights themselves were held to have so far ceased as to permit the wife to give a deed of such estate, valid in equity, for the purpose of providing for her support without the husband's joining in the conveyance.

*Separate character impressed upon property by understanding and conduct—Settled rule as to personal property here held applicable to real estate—*In this case the wife had for many years exercised the sole and exclusive management and control of her real estate, without the assertion of any marital rights on the part of the husband, who had, in like manner, permitted her to give the deed in question, and the obligation of the grantee thereunder to support her to be fully carried out. In these circumstances the decision of the court would likewise result from the application to the real estate of the wife of the settled rule with respect to personal property which both husband and wife have treated as hers and as subject to her sole use.

CHANCERY. Heard on demurrer to the orators' bill. Bennington County, June Term, 1899, before *Munson*, Chancellor, who rendered a decree sustaining the demurrer and dismissing the bill. The orators appealed.

The bill was brought by Elenora D. Curtis and James D. Curtis, her husband, against John R. Simpson and Adelbert E. Simpson, and John T. Shurtleff, administrator of the estate of Martha Simpson, deceased.

The bill alleged that the deed considered in the opinion, given by said Martha Simpson to her daughter, the said Elenora D. Curtis, by its terms reserved to the grantor the occupancy and control, rents and profits of the premises conveyed during her life, and that the conveyance was in consideration or part consideration that said Elenora and her husband should henceforth render to the grantor such personal services, care, attention and nursing in sickness as should be necessary to promote her comfort and well-being and as were commensurate with her station in life. The bill further set out that from the time of the execution of the deed until the death of the said Martha, the orators performed on their part all the acts and things to be performed as the consideration or part consideration for the deed as above recited.

The bill also alleged that a further purpose of the said Martha Simpson in making the conveyance above referred to, was to provide something for the grantee, her daughter Elenora, out of the estate of the said Martha, which, as the bill alleged, she had already divided in great part between her other children.

The bill was brought to remove a cloud upon the title of the oratrix, Elenora D. Curtis, caused by the claims of the defendants that the said deed was null and void, to restrain the defendants from conveying or attempting to convey the real estate in question or any interest therein, and to have the said deed confirmed and established.

Batchelder & Bates for the orators.

Charles H. Mason for the defendants.

Taft, C. J. The question in this case relates to the validity of a deed of real estate executed by Martha Simpson, of whose estate John T. Shurtleff, the defendant, is administrator. At the time of the execution of the deed, she had a husband, John R. Simpson, a defendant. The deed was given by the said Martha to her daughter Elenora D. Curtis, the oratrix. Adelbert E. Simpson, defendant, was the son of Martha, and claims that

the property conveyed, belongs to his father as surviving husband of Martha, and to Martha's estate, for that under V. S. secs. 2209 and 2646, the conveyance from Martha to her daughter, at a time when Martha's husband was living, was void, upon the ground that John R. Simpson, the husband, did not join with his wife in the execution of the deed. Since the death of Martha, Adelbert has purchased the interest of John R. in the premises.

This is a bill in equity, and the oratrix claims that the deed was valid considering the purposes for which it was given, and that in equity, the deed will be upheld upon the ground that Martha, the mother of the oratrix, at the time of the execution of the deed had power to convey the estate for the purpose of her support; that the property was impressed with the character of separate estate.

It is not alleged in the bill that the property conveyed by Martha Simpson to the oratrix was, by the terms of the deed to her, held to her sole use. It was not made her separate estate by the terms of the conveyance, and it is a well settled rule that the instrument of conveyance must contain explicit words of exclusion in order to shut out the husband and his assigns from his marital rights. *Frary v. Booth*, 37 Vt. 87; *Hubbard v. Bugbee*, 58 Vt. 172; *Hackett v. Moxley*, 68 Vt. 210.

The husband may, by an ante-nuptial agreement, stipulate that property coming to the wife during coverture should be her separate property, subject to her exclusive disposal. Such agreement in equity will disembarass the wife from any marital restraints in the disposition of it. And a post-nuptial agreement of a similar character made upon sufficient consideration (as, for instance, that the wife should support herself without calling upon her husband, if performed by the wife), and, as stated in the opinion in *Pinney v. Fellows*, 15 Vt. 525, "for sufficient reasons" will, in equity, be held equally effectual.

A court of equity provides a competent provision for the support of the wife from property which comes to her in her own

right, although it is property that by the terms of the conveyance to her is not held to her sole use. This is what is called in the books, "the wife's equity." *Pinney v. Fellows* 15 Vt. 525; *Barron v. Barron*, 24 Vt. 375.

There was in this case no express, ante, nor post-nuptial agreement that the property of the wife should be held to her sole use, but the facts in the case put the husband in the same relation to this property as if there had been. It makes no difference in what way property belonging to a married woman is invested with the character of separate estate. If it is so held by her, in equity, she has power to charge it for her own benefit, the same as if she were discoverer.

The reasoning of the court in *Frary v. Booth*, *supra*, 88 et seq., and *Hubbard v. Bugbee*, *supra*, requires us to hold that the property in question was held to the sole use of Martha.

In the case before us, the husband had not lived with his wife for more than thirty-eight years prior to her death; he had not, during all that time, sustained the relation of husband to her; he had not, for many years, furnished or provided anything for her maintenance or support, nor for her necessities of life. She, the wife, was old and infirm; she desired to provide a place for herself to live for her remaining days, she had managed her property during her life as she chose,—had provided for the maintenance of her husband during his life, and had given much of her property to her children other than the oratrix, and it does not appear that her husband had dissented from such control of the property, or in any manner had attempted to claim and exercise his marital rights in regard to it. He had permitted her to give away almost all her property, made no objection that is disclosed by the record to her making the contract in question, permitted the party with whom it was made to execute the contract and carry it out. In this manner the property became invested with the character of separate property, so that the wife had power to charge it with her support as if she were sole. It should be borne in mind that the right of the husband to the

property of the wife was given him in consideration of the obligation resting upon him by the marriage, to pay her debts, and maintain her and her children. It is evident she had no debts to pay nor children to support, and for years he had neglected to provide anything for her maintenance. The reasons for giving him a claim in her property not existing, his interest in the respect claimed should cease so far as to permit her to maintain herself, and acquire that support which he had failed to provide for her. This rule which we apply to the real estate of the wife is the same which has been for many years applied to personal property held under such circumstances, that is,—when the parties treat personal property as that of the wife, such understanding is to be carried out and her conveyance of it is valid. In this respect it has been held that her conveyance was good at law. In *Richardson v. Morrill's Est.*, 32 Vt. 27, it was held that notes, taken for the wife's money, that were made payable to the husband, and were found among his papers, and inventoried as a part of his estate, belonged to the wife,—he not having exercised his marital rights in relation to the notes. See also *Caldwell v. Renfrew*, 33 Vt. 213. In *Willard v. Dow*, 54 Vt. 188, it was held that an understanding between husband and wife that the latter may hold her property, which would otherwise belong to her husband, to her sole use, may be implied from the fact that it had always been treated by them as hers, and her conveyance of such personal property to secure her support for life, was held valid in an action at law.

The decree sustaining the demurrer and dismissing the bill reversed, and cause remanded.

J. W. RUSSELL v. C. A. ROOD.

January Term, 1900.

Present: TAFT, C. J., TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed April 24, 1900.

*Note—Partial failure of consideration—V. S. 1152—Who are original parties—*In an action on a note evidence to show a partial failure of consideration is not admissible under V. S. 1152, unless the action is between the original parties to the note as shown by the note itself.

ASSUMPSIT on a promissory note. The defendant pleaded the general issue, and gave notice of special matter of defence. Trial by jury, Chittenden County, September Term, 1899, Rowell, J., presiding. Verdict directed for the plaintiff. Judgment on verdict. The defendant excepted.

The note in suit was for \$22.50, signed by the defendant and payable to the order of the International Seed Company. It was conceded by the plaintiff that it was endorsed to him after maturity, without value, and solely for the purpose of collection.

The note was given in the purchase of ten bushels of oats, and a contract of even date therewith, which, it was agreed, showed the consideration therefor, was introduced in evidence by the plaintiff together with the note.

The defendant's notice of special matter in defence set up a total failure of consideration in that the oats delivered were entirely worthless for the purpose for which they were bought, which was to use them for seed to obtain oats of an improved kind.

The notice also set up a partial failure of consideration, which the defendant claimed the right to show under V. S. 1152, on the ground that the real plaintiff in interest was the International Seed Company, the original payee.

The defendant offered evidence to show that the transaction of buying the oats and giving said note therefor was had with

an agent of said company who represented to him at the time that the oats called for by the contract were an improved and a superior kind, would weigh more to the bushel than the oats that the defendant had been raising, would yield more to the acre, would yield sixty bushels to the acre, and would not rust like common oats; that said agent then showed the defendant a sample; that as a result of said representations, and relying thereon, and not otherwise, the defendant executed said contract and gave said note.

The defendant further offered to show that when the oats came, he thought they were not up to the sample and not like the sample, but was in doubt about it, and that he conferred about the matter with a Mr. White, whom he supposed to be acting for said company, and that the next spring, acting in good faith, he sowed eight bushels of the oats, to see what they would turn out to be, and that they proved to be nothing but common American oats, and would not and did not produce as represented, that they rusted, and were light in weight; that they were not the kind of oats called for by the contract, nor so valuable in any respect, and were not worth over forty cents per bushel, and that the whole ten bushels were not worth over \$4.00.

The defendant claimed from what he offered to show that the representations of said agent in regard to the oats were fraudulent as well as false, but he admitted that he never had offered to rescind, and had never notified said Company that the oats were not satisfactory.

The defendant did not claim an entire failure of consideration in the sense that the oats delivered to him were not worth anything for any purpose, but only in the sense that they were worth nothing to him for the purpose for which he bought them.

The defendant further offered to show that he intended to keep the two bushels of oats that he did not sow, and put them away for that purpose; but that soon after sowing the others, at a time when he was sick, his hired men used them up or disposed of them in some way without his knowledge or consent or fault.

The evidence offered by the defendant was excluded.

D. J. Foster and *J. T. Stearns* for the plaintiff.

Henry Ballard and *H. F. Wolcott* for the defendant.

START, J. The action not being between the original parties to the note, the evidence offered by the defendant was properly excluded. The defendant did not offer to rescind the contract, and the evidence would only tend to show a breach of the contract and a partial failure of consideration; therefore, the offer was not within the provision of V. S. 1152, which provides that, in actions between the original parties to a note, the defendant may show partial failure of consideration. This statute only applies to actions between the maker and payee of the note as shown by the note itself. *Hoyt v. McNally*, 66 Vt. 38; *Burgess v. Nash*, 66 Vt. 44; *Thrall v. Horton*, 44 Vt. 386.

Judgment affirmed.

Taft, C. J., and *Watson*, J., dissent.

ELIJAH P. HERRICK and LUCY ANN HERRICK v. JENEVA S.
MCCAWLEY and HARRIS MCCAWLEY.

October Term, 1899.

Present : ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed April 26, 1900.

Findings supported by evidence conclusive—Party a witness—Inconsistent declarations of party—When there is evidence before a master tending to show previous declarations of a party at variance with his testimony, it is the duty of the master to determine whether or not the declarations were made, and if they were made, to weigh and consider them in their effect upon the testimony of the party who made them, and as evidence in chief in connection with all the evidence in the case, and by the master's findings and failures to find upon such consideration of the evidence the parties are concluded.

CHANCERY. Heard on pleadings, master's report and exceptions thereto. Chittenden County, March Term, 1899, before Taft, Chancellor, who rendered a decree dismissing the bill. The orators appealed.

The question was as to the sufficiency of the evidence to support the master's findings.

H. N. Deavitt for the orators.

Powell & Powell for the defendants.

STARR, J. The answer put in issue the material allegations of the bill, and these issues are found in favor of the defendants. The orators' counsel does not claim that the testimony of the defendant, Jeneva S. McCawley, did not tend to support the findings ; but he contends that the orators' testimony tended to show that her previous declarations were at variance with her testimony, and that, for this reason, the findings are unwarranted and against the weight of evidence. The fact that such evidence was before the master does not furnish a reason for departing from the rule, that, in the absence of fraud, findings supported by evidence are conclusive. It was the duty of the master to find whether the declarations were made and, if made, to weigh and consider them, and say how far they confirmed the claims of the orators, or affected the testimony introduced by the defendants, and, from a consideration of all the evidence, find whether the material allegations of the bill were true ; and, by his finding and failure to find, the orators are concluded. *Howard v. Scott*, 50 Vt. 48 ; *Willard v. Pinard*, 65 Vt. 160 ; *Waterman v. Buck*, 58 Vt. 519.

Decree affirmed and cause remanded.

MARY A. HYDE v. TOWN OF SWANTON.

January Term, 1900.

Present: TAFT, C. J., ROWELL, STARR, THOMPSON and WATSON, JJ.

Opinion filed April 24, 1900.

Charge—Instruction more favorable than request—An exception to the denial of a request to charge avails nothing, when an instruction is given upon the subject matter of the request more favorable to the excepting party than the requested instruction.

Request improperly restrictive—In a negligence case a request for an unqualified instruction that if certain facts are found the plaintiff is entitled to recover must be disregarded, when there is evidence of other facts having some tendency to show negligence on the part of the plaintiff and want of it on the part of the defendant.

Request not applicable to the case—A request for an instruction not applicable to the case, in the state of the evidence, is properly denied.

Instructions of the court as to the law bind the jury—Law books read from in their hearing by counsel—It is the duty of the jury to be guided by the law as the court states it; and it is proper for the court to instruct them to disregard a case read in their hearing, in an argument addressed to the court.

Evidence—Plan—Presumption when record is silent—A plan having been received in evidence by the trial court, it will be presumed that there was evidence tending to show its correctness, if the record is silent on that point.

Party may contradict or correct the testimony of his own witness—A party who without objection introduces in evidence a plan in connection with the testimony of a witness that it is accurate, is not precluded from showing by another witness that certain distances as designated thereon, are incorrect.

That a fact is conceded renders error in proving it harmless—When the opinion of a witness based on assumed facts is inadmissible, its reception is harmless error, if its sole tendency is to show a conceded fact.

Irrelevant testimony which is not prejudicial—The admission of evidence that has no bearing upon any issue in the case is not reversible error if it could not have been prejudicial.

Error in reception of evidence cured by verdict—When, in a negligence case, it is not questioned that the plaintiff received the injury of which he complains, error in the admission of evidence relating solely to

the amount of damages is cured by a verdict for the defendant which must have gone on the ground of want of negligence on the part of the defendant, or of contributory negligence on the part of the plaintiff.

Cross-examination to show ill-will—Discretion as to latitude of re-examination—A witness having admitted, on cross-examination by the plaintiff's counsel, that her sister had had some trouble with the plaintiff, it was within the discretion of the court to allow the defendant's counsel, on re-examination, to ask the witness what the trouble was.

Definition—"Suffer"—It cannot be said that the officers of a town suffer the use of a way, unless they know or ought to know of its use.

CASE FOR NEGLIGENCE. Plea, the general issue. Trial by jury, Franklin County, March Term, 1899, *Munson*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

D. W. Steele and *F. W. McGettrick* for the plaintiff.

Henry A. Burt, *D. J. Furman* and *Alfred A. Hall* for the defendant.

START, J. The plaintiff's evidence tended to show, that she received injuries by reason of the insufficiency of a box or catch basin which formed a part of a culvert at the intersection of First and Liberty streets in the Village of Swanton; that the box was outside of the corporate limits of the village and within the limits of a highway that the defendant town was bound to maintain and keep in repair. About two years prior to the accident, one of the trustees of the village, supposing the point in question was within the corporate limits of the village, constructed the culvert and box and placed a covering over the box for the purpose of furnishing a sidewalk for the public to walk over.

The plaintiff's first, third, fourth and seventh requests may be considered together. By them, the plaintiff, in effect, asked for an instruction, that, if private individuals made a way and the public were permitted to use it for public travel for a long time, or if the public travel itself made a way without other agency and the way was suffered by the town authorities to be made, the town was bound to keep it in such condition or repair that it would be reasonably safe as a part of the highway for the

amount and kind of travel that might be fairly expected to pass over it, and with reference to such accidents as might fairly be expected to occur in its use. The court instructed the jury, that, if the box was within the walk as travelled by the general public, it was the duty of the town to keep it in repair. This instruction was more favorable to the plaintiff than her requests. Under it, the jury were at liberty to find that it was the duty of the town to keep the box in repair, without reference to the knowledge of the defendant's officers respecting its use, or when, how or by whom the walk was constructed. It could not be said that the defendant's officers suffered a use of the way unless they knew, or ought to have known, of its use; therefore, the requests called for an instruction that would require the jury to find that the use of the way was known to the defendant, and a finding as to how and by whom the way was made, and its use by the public for a long time, while the instruction only required a finding that the box was within the walk as travelled by the general public, in order to impose upon the town the duty of keeping it in repair.

The court properly disregarded the plaintiff's second request. By it, she asked for an unqualified instruction, that, if the box was so constructed, covered and bore such relation to the portion of the highway utilized by the travelling public for foot travel, and was so constructed and covered as to indicate to a person of ordinary prudence that it was a part of the sidewalk, or such portion of the highway as was intended for foot travel, and the plaintiff so regarded it when she stepped upon it, she was entitled to recover. Such an instruction would have taken from the jury the question of whether the defendant's officers knew of the existence and use of the box, or were negligent in not knowing, and left the jury to find for the plaintiff, notwithstanding she may have been guilty of contributory negligence in stepping upon the box, knowing it to be unsafe. Her evidence tended to show that the box was in a dangerous condition for some days prior to the accident, and that the plaintiff, for nearly two years,

had been accustomed to 'pass over it almost daily; and it is doubtful whether the testimony had any tendency to show that the defendant's officers knew of the existence or use of the walk at the place of the accident. In this state of the evidence, the questions of knowledge on the part of the town and of contributory negligence on the part of the plaintiff could not, on the plaintiff's request, be withheld from the jury.

The plaintiff, by her eighth request, in effect, asked for an instruction, that, if the beaten path along the side of the box was insufficient for the amount and kind of travel at that point and, in the absence of any other established or constructed walk, the box cover presented a safe and feasible course of travel to a person of ordinary prudence, and it presented such appearance to the plaintiff, it was not necessarily a voluntary departure by her from the established course of travel to step upon it as she did at the time of the accident. Under the instruction, the jury were not called upon to decide whether the plaintiff voluntarily departed from the established course, and the case, in so far as it appears before us, did not call for any instruction upon that subject. The plaintiff did not, by her evidence, claim that she departed from an established course of travel. On the contrary, her evidence tended to show, that one of the trustees of the village covered the box for the purpose of furnishing a sidewalk for the public to travel over; that the common course of travel was over the box; that the culvert and box had been commonly used by travellers on foot; and that she had walked over the box almost daily for two years, supposing the plank covering to be a part of the sidewalk. In view of this evidence and the instruction given by the court, as is herein stated, there was no occasion for confusing the jury by submitting for their consideration any question respecting a voluntary departure by the plaintiff from a way that the town was bound to keep in repair; and the request was properly denied.

It was the duty of the jury to take the law from the court; and the court rightfully instructed them to do so and to disre-

gard the case read in their hearing by counsel. The court told the jury, that, when a walk has been designated by general public travel and the town permits the travel to continue in that course, it becomes the duty of the town to recognize the walk and keep it in good and sufficient repair. The plaintiff had no reason to complain of this instruction ; and, in view of it and what has already been said, it is unnecessary to consider further the charge of the court or the plaintiff's requests.

F. H. Dewart, a civil engineer, was improved as a witness by the defendant and produced a plan made by him, which he said was an accurate plan of the location where the accident happened. He did not profess to know anything about the situation and condition of the point in question at the time of the accident. Such knowledge on his part was not necessary. If the other testimony in the case tended to show that the situation was as shown upon the plan, it was admissible. It does not appear that such evidence was not before the court, and we cannot, for the purpose of finding error, assume that the evidence did not tend to show the location and surrounding objects as shown upon the plan. The principal objection urged before us is, that certain stones shown on the plan and designated by the words, "old curb stone," marked a lot line, but the exceptions show that the defendant's testimony tended to show that they were a part of the old curbing on the outside of the walk as it was at the time of the accident. Therefore, the testimony tended to show that the plan, in this respect, was correct. The defendant's engineer, after testifying that he had made excavations in the vicinity of the box since the case had been in court and found, several inches below the surface, a smooth stratum that he called an old path, which led past the box on the north side, was asked, "Assuming that, within one or two weeks after the accident to Mrs. Hyde, the earth around the catch basin and the path, whatever path was used had been used up to the time of the accident, and had been filled in and covered over with fresh earth, then, independently of anything you were told, what do you say as to whether that

path you uncovered existed at the time Mrs. Hyde received the injury?" The witness answered, "On the assumption that you have made, I should have no hesitation in saying it was the path at the time of the injury." If this was error, it was harmless. The plaintiff's evidence tended to show, that, for a great many years there had been a well-defined path at this point, used by the public for foot travel; and the court instructed the jury that, "the plaintiff concedes that there was a well-defined path leading past this box on the north side of it, but she contends, that, after the walk was made, the general public widened its course of travel and extended the limits of the walk so that it included the box." It does not appear that the plaintiff questioned the correctness of this statement; and, in view of this statement and the tendency of the plaintiff's testimony, it is clear that the path uncovered by the witness was the identical path which the plaintiff conceded was a well-defined path at the time of the accident. The witness was called upon to give his opinion as to whether that path existed at the time Mrs. Hyde received the injury, and his opinion as to the existence of a fact which the plaintiff's evidence tended to show and was conceded by her could not have been prejudicial.

The plaintiff introduced as a witness one Spear, who testified that a plan purporting to show certain points about the locality in question, as surveyed by him, was accurate. The plan was received in evidence without objection; but the fact that it was so received did not preclude the defendant from showing by its engineer that the distances indicated thereon were not correct. The reasons given by the witness Dewart for uncovering the box after he had caused it to be covered had no bearing upon any issue in the case and could not have been prejudicial to the plaintiff.

The testimony of Mrs. Ladd, a witness introduced by the defendant, related solely to the amount of damages sustained by the plaintiff. No question was made but that the plaintiff was injured; and, as the jury have found that the defendant was not

responsible for such injury, it is unnecessary to consider the question asked on cross-examination and excluded. Under the instruction of the court, the jury must have found that the box or catch basin was not within the walk as travelled by the general public, or that the plaintiff was guilty of contributory negligence. It follows, therefore, that the answer to the question propounded could have no bearing upon any question considered by the jury, would have been wholly immaterial, and that the plaintiff was not harmed by its exclusion.

Mrs. McNall, a witness improved by the defendant, was asked on cross-examination whether the plaintiff had some trouble with the sister of the witness, and answered in the affirmative. In the re-direct examination of the witness, she was asked to state what that trouble was. The plaintiff's counsel had brought out the fact that the plaintiff had trouble with the sister of the witness, with a view to showing that the witness had a prejudice against the plaintiff that would influence her testimony; and the plaintiff having brought this issue into the case, it was discretionary with the court to allow the question propounded by the defendant's counsel. *Bartoli v. Smith & Co.*, 69 Vt. 427.

Judgment affirmed.

CONGREGATIONAL SOCIETY IN HUBBARDTON v. CHARLES L. FLAGG.

January Term, 1900.

Present: ROWELL, TYLER, MUNSON, START, and THOMPSON, JJ.

Opinion filed April 24, 1900.

Obligations assumed by acceptance of deed—Liability enforceable in equity by party to be benefited.—By virtue of the provisions of a bequest to the orator, one F held a fund that he was under obligation to give security for, and pay annual interest on, or to pay it over to the orator, and

while so holding it he conveyed all his property to his son in consideration of the son's assuming such obligation. By accepting such conveyance and appropriating to his own use the property so conveyed, which afterwards depreciated in value till its value was less than the amount of the fund, the son became personally liable in respect to the fund, and the orator could in equity enforce his liability.

Same—The liability of the son was conterminous with that of his father whose liability he assumed, and, since the father had the option to pay over the fund, instead of giving security and paying interest, the son had the same option and could not be compelled to give security.

Construction of wills—Provision for investment of fund bequeathed—Contingent right of legatee to possession of the fund—A direction in a will that a fund, bequeathed to the orator, should be placed in the hands of F to so remain as long as he or his heirs should pay the interest thereon annually and give sufficient security therefor, was merely a provision for the investment of the fund; and upon failure to receive either security or interest, the orator, an incorporated society capable of holding and receiving the fund for the purpose contemplated in the bequest, was entitled to its possession.

Costs in the Supreme Court—Neither party having entirely prevailed on the appeal from the decree of the Court of Chancery no costs were allowed in the Supreme Court.

CHANCERY. Heard on pleadings and report of a special master, Rutland County, March Term, 1899, before *Watson*, Chancellor. Decree for the orator. The defendant appealed.

The provision of the will of Elizabeth Dunning construed in the opinion was as follows:

"I do also give and bequeath all the remainder of my estate, both real and personal, after funeral expenses and all my just debts are paid, to the First Congregational Church and Society in Hubbardton aforesaid, the interest of which to be used for the support of the preaching of the gospel annually forever, the principal to be placed in the hands of my friends, James Flagg and Amasa W. Flagg, and so to remain as long as they or their heirs pay the interest annually to the said Church and Society, with good and sufficient security. The said principal to remain as a permanent fund forever, and if in the process of time the said Congregational Church and Society shall become

extinct and cease to be, then, and in that case, it is my will that the interest on said estate be paid to the Domestic Missionary Society annually for the support of domestic missions."

The orator's bill prayed that the defendant might be directed to give good and sufficient security for the fund in question and the interest thereon, or that the defendant might be directed to pay the principal of the fund to a trustee to be appointed, and to pay the interest accrued and unpaid to the orator.

The defendant in his answer averred that he was ready and willing to release and convey to the orator the real estate conveyed to him by his father as stated in the opinion, but denied any personal liability to the orator.

The decree of the Court of Chancery was that the defendant pay to the orator the interest accrued and unpaid with costs of suit, and that, on or before a day fixed, the defendant execute and deliver to the orator good and sufficient security for the payment of all future installments of interest, with leave to the orator to apply to the court for a further decree if such security should not be given as required.

Joel C. Baker for the orator.

Henry L. Clark for the defendant.

START, J. Elizabeth Dunning died on the 3rd day of February, 1845, leaving a will, by which, after making provisions for the payment of debts, funeral expenses and the charges of administration, she gave her estate to the orator, and provided that the same should be placed in the hands of James and Amasa W. Flagg and so remain as long as they, or their heirs, should pay the interest annually to the orator and furnish good and sufficient security therefor. The administration of the estate was committed to James Flagg, the executor named in the will; and, on the 5th day of November, 1845, he settled his account with the Probate Court and, after paying the debts, funeral and administration expenses, there remained in his hands to be decreed to the orator,

as provided in the will, the sum of \$1214.94. Amasa W. Flagg did not accept the trust and never received any of the sum so found in the hands of the executor or paid any interest thereon. James Flagg, the executor, retained the sum found in his hands as executor and, for nearly twenty years, annually paid the interest thereon to the orator for the purpose specified in the will. On the 27th day of December, 1870, James Flagg, by his deed containing the usual covenants of warranty, conveyed to his son, the defendant, a piece of land supposed to contain about two hundred acres, subject however to a provision in said deed as follows: "Provided nevertheless that it is understood that said James Flagg is to have the use of the above described farm during his natural life, and he is to pay the interest due the Congregational Society from the Elizabeth Dunning fund so long as he lives, and, at his decease, the said Charles L. Flagg shall obligate himself to assume the same debt, then this deed shall be good and valid, otherwise to become void." On the 27th day of February, 1872, said James Flagg, for the expressed consideration of one dollar, executed and delivered to the defendant a quit-claim deed of the land conveyed by the conditional deed. The land so conveyed to the defendant was worth, at the time it was conveyed, from twenty-five hundred to three thousand dollars, and is now worth from eight to ten hundred dollars. The defendant did not pay any money in consideration of said conveyance, nor did he agree to do so, except as herein stated. At the time of the conveyance, James Flagg had no other property, except a small amount of personal property which he transferred to the defendant at the time the land was deeded, as a part of the same transaction. The defendant went into the possession of the land and made some payments of interest to the orator prior to James Flagg's death, which occurred on the 1st day of January, 1873; and, since the death of James Flagg, the defendant has continued, and is now, in the possession, use and enjoyment of the farm and has paid the interest on said fund to the orator to the 1st day of April, 1895. Neither James Flagg nor the defendant have given any security

for the payment of the interest on the trust fund, unless the conditional deed is such security, and no interest has been paid since April 1, 1895. The parties have had talk about the defendant's giving security for the payment of the interest, the orator requesting him to execute a mortgage of the land so conveyed and of other lands owned by the defendant. This the defendant declined to do, but offered to deed to the orator the land so conveyed; this offer was declined by the orator. The defendant also offered to pay the orator rent on the land at the rate of seventy-two dollars per annum, but this offer was declined by the orator for the reason that the defendant insisted that the money offered should be paid, if paid, as rent instead of interest on the fund.

The trust fund was, at the time of the conveyance, in the hands of James Flagg; and he was under a duty to give the security required by the will and pay the interest annually to the orator, or pay over the principal, and was liable, at any time, to be called upon to do so. While he was thus liable, in consideration of the defendant's undertaking to assume and discharge this liability, he conveyed all his property to the defendant, the deed by which the property was conveyed containing a provision that the defendant should obligate himself to assume this debt. No particular form of words was necessary to create a personal liability on the part of the defendant; the words in the deed import the assumption of such a liability. The defendant, by accepting the deed and, under it, appropriating the property to his use, became personally liable for the discharge of the obligation then resting upon his father; and the orator, in equity, may enforce this personal obligation for its benefit. *Davis v. Hulett*, 58 Vt. 90; *Hodges v. Phelps*, 65 Vt. 303. But the defendant cannot be compelled to give security. It was optional with his father to give security and pay the interest annually to the orator, or pay the principal to the orator; and the obligations assumed by the defendant were only those that his father was under at the time of the conveyance. The bequest is to the orator. The principal is to be kept as a permanent fund and the income used by

the orator. The principal was to be placed in the hands of James and Amasa W. Flagg and there remain only so long as they, or their heirs, should annually pay the interest thereon and keep the security good. This direction only provided for an investment of the fund while the security was kept good and the interest annually paid to the orator; and, when the defendant ceased to pay interest and neglected to give security, the principal and unpaid interest became due and payable to the orator. The orator is incorporated and capable of receiving and holding the estate for the purposes provided in the will, and is entitled to a decree for the sum of \$1214.94, with annual interest thereon from April 1895. Neither party having entirely prevailed on appeal, no costs are awarded in this court.

Decree reversed and cause remanded.

STATE v. INTOXICATING LIQUOR, ROYAL ADAMS, CLAIMANT.

May Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed April 26, 1900.

Intoxicating liquor—Res judicata—An acquittal of a respondent in a prosecution for keeping certain liquors with unlawful intent is conclusive in favor of the same person as claimant in a proceeding looking to the forfeiture of the same liquors on the ground that they were kept with unlawful intent, if the intent in both proceedings is referable to the same time, and his ownership and custody of the liquors at that time are found.

Judgment in a criminal case as evidence in a civil proceeding—While the rules governing the admissibility of judgments will ordinarily prevent the use, in a civil proceeding, of a judgment previously rendered in a criminal case, the mere fact that the one proceeding is civil, and that the other was criminal, does not render the doctrine of *res judicata* inapplicable.

Same—Proceeding in rem is inter partes as to claimant—Though a proceeding for the forfeiture of liquor is, in its nature, *in rem*, when one comes in as a claimant, it is, as to him, a proceeding *inter partes*, and he is entitled to the benefit of a previous adjudication of the same question in a proceeding between himself and the State.

Mutuality of right—In respect to the use in a civil case, to which the State and a claimant are parties, of a judgment obtained in a criminal case between the State and the claimant as respondent, no reason is seen why there is not mutuality of right between the State and the claimant.

PROCEEDING FOR CONDEMNATION of certain liquors taken from the possession of the claimant upon search and seizure proceedings in November, 1898. Trial by Court, Windsor County, December Term, 1898, *Taft*, J., presiding. Judgment that the liquors be forfeited and that the claimant pay the costs of the proceeding. The claimant excepted.

J. G. Sargent, State's Attorney, for the State.

William E. Johnson for the claimant.

MUNSON, J. This is a proceeding for the condemnation of certain liquors found in the possession of the claimant. On trial, the claimant offered a certified copy of the record of his acquittal on a charge of keeping with unlawful intent, and in connection therewith, evidence that both proceedings related to the same liquor. The court found that the liquors sought to be condemned were the property of the claimant and the same as those involved in the prior adjudication, but excluded the record of the judgment as immaterial.

It appears then to have been judicially ascertained, in a proceeding between the State and this claimant as a respondent, that these liquors were not kept with an intent to dispose of them unlawfully, and if that fact were shown in this proceeding, it would be conclusive against the right of condemnation. It is apparent that a finding as to intent upon one day would not be conclusive as to the intent upon some other day; but counsel treat both these proceedings as referable to the same date, and we take that to be the meaning of the exceptions.

It is said that this proceeding is civil and not criminal in its nature, and that a judgment in a criminal case cannot be used in a civil action as proof of the facts determined. Undoubtedly the rules governing the admissibility of judgments will ordinarily prevent this use, but the mere fact that one proceeding is civil and the other criminal does not render the doctrine of *res judicata* inapplicable.

But it is said that the doctrine is applicable only where the parties are the same, and that the parties to the record offered and the parties to this proceeding are not the same. It is true that this is in its nature a proceeding *in rem*; but when one comes in as a claimant it is, as to him, a proceeding *inter partes*, and he is entitled to the benefit of a previous adjudication of the question in a proceeding between himself and the State. *Coffey v. United States*, 116 U. S. 436: Book 29 Law. Ed. 684.

It is objected further, however, that there must be mutuality of right, and that if the judgment rendered had been in favor of the State it could not have been produced against the claimant. We see no reason why it could not. The proceeding was one in which the respondent was entitled to a jury, and to testify in his own behalf, and to have the fact ascertained beyond a reasonable doubt. He could have been entitled to no greater safe-guards upon an inquiry in this proceeding.

Judgment reversed and cause remanded.

JOSEPH YATTER v. PITKIN & MILLER.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and
WATSON, JJ.

Opinion filed May 11, 1900.

Time of returning precept to be shown by return—The time when an execution is returned into the office of the clerk of the court from which it issued is one of the things required to be shown by the return itself.

Return not to be collaterally attacked—The time of the return, as shown by the return itself, cannot be contradicted except in a direct proceeding to vacate or annul the return.

Scire facias—Return on execution conclusive—In an action of *scire facias* against bail, to maintain which it is necessary to show a return of *non est inventus* on an execution against the principal within the time fixed by law, the return of the officer is, in the absence of fraud, conclusive as to the time when the return was made.

SCIRE FACIAS brought by the plaintiff against the defendants on their liability as bail in an action of tort in which the plaintiff recovered final judgment in the Supreme Court for Washington County, against one Omer Miller and took out execution thereon. This action was brought to the Supreme Court for Washington County and was heard on the report of a referee appointed to find and report the facts.

Before the referee the plaintiff introduced in evidence the officer's return of his doings as endorsed on the execution, and relied upon that to show that the execution was returned January 12, 1889, the day named in the return itself.

The defendant introduced and relied upon the evidence of M. E. Smilie, clerk of said court, who testified that the execution was in fact returned January 28, 1889, and not before, referring for the exact date to a minute or filing stamped by him as clerk upon the back of the execution.

The evidence was received subject to objection and the referee reported that if the evidence of the clerk was admissible he found that the execution was returned on the day named in his testimony, otherwise that it was returned on the day recited in the return itself.

Both parties filed exceptions to the report of the referee.

J. G. Wing for the plaintiff.

Dillingham, Huse & Howland for the defendants.

START, J. The action is *scire facias*. The plaintiff seeks to charge the defendants as bail for the amount of a judgment of this court in an action of tort against one Omer Miller; and

the issue is, did the plaintiff cause a legal return of *non est inventus* to be made on the execution within sixty days from the time of rendering final judgment.

At the time the judgment was rendered, R. L., sec. 1538, was in force, which provides that no execution shall issue on a judgment of the Supreme or County Court until twenty-four hours after the rising of the court, unless by special permission. R. L., sec. 1545, provides that the day on which the plaintiff is first by law, without leave of court, entitled to an execution on a judgment rendered in his favor, shall be deemed the time of rendering such judgment so far as relates to holding property attached on mesne process, and the charging of a person as bail for delivering up the body of the principal. It does not appear that special permission was given for the issuing of an execution, and, under these statutes, the day following the adjournment of the court must be regarded as the day on which final judgment was rendered. The return upon the execution shows that the execution was returned to this court on the 12th day of January, 1889. If this is conclusive, the issue is found by the referee in favor of the plaintiff.

The deputy sheriff to whom the execution was delivered was lawfully commanded to make due return, with his doings thereon, within sixty days. R. L., sec. 1538. It was his duty to serve it according to its direction. R. L., secs. 2577, 856. This required him to make a return of his doings. One of the things he was required to do was to return the execution into court within sixty days from its date, and, if he did so return it, it was his duty to show this fact by his return. In stating that he returned the execution on the 12th day of January, 1889, he was doing what the precept required him to do ; and this statement is a part of the return he was required to make. *Gilson v. Parkhurst*, 53 Vt. 384. It being the duty of the officer to show by his return the time when he returned the execution into the office of the clerk of the court from which it issued, the case

falls within the general rule that an officer's return, as between the parties to a suit and their privies, imports absolute verity and cannot be contradicted, except in a direct proceeding to vacate or annul it. Encyclopædia of Pleading and Practice, vol. 18, 965; *Eastman v. Curtis*, 4 Vt. 616; *Bank v. Downer*, 29 Vt. 332; *Swift v. Cobb*, 10 Vt. 282; *Gilson v. Parkhurst*, 53 Vt. 384; *Sawyer v. Harmon*, 136 Mass. 414. At the time the defendants became bail for the appearance of Miller, and at the time the judgment was rendered and the execution issued, our statute, R. L., secs. 1470, 1471, made a return of *non est inventus* within sixty days from the time of rendering final judgment the foundation for *scire facias* against bail; and, in such action, the return of the officer is, in the absence of fraud, conclusive. American and English Encyclopædia of Law, 2 ed. vol. 3, 623; *Winchel v. Stiles*, 15 Mass. 230; *Cozine v. Walter*, 55 N. Y. 304; *Parkhurst v. Sumner*, 23 Vt. 541; *Mott v. Hazen*, 27 Vt. 213; *Chamberlain v. Godfrey*, 34 Vt. 383; *McArthur v. Pease*, 46 Barb. 423; *Bradley v. Bishop*, 7 Wend. 353.

After this opinion was written, and before it was announced, the defendants surrendered the principal into court, paid the costs and were discharged.

E. G. AND S. C. GREENE v. JAMES McDONALD, E. A. SOWLES
and O. A. BURTON.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed May 16, 1900.

Appeal from chancery decree—Acts 1898, No. 95, sec. 6 and V. S. 981—See opinion.

CHANCERY. Heard at the September Term, 1899, Franklin County, before *Munson*, Chancellor. Decree for the orators.

The decree was filed January 16, 1900, and a motion for an appeal was filed on behalf of the defendants, February 10, 1900.

The allowance of the appeal was filed April 16, 1900.

In the Supreme Court the orators moved to dismiss the appeal.

Alfred A. Hall for the orators.

E. A. Sowles for the defendants.

PER CURIAM. A motion for an appeal from a vacation decree must be filed within twenty days from the time the decretal order is filed with the clerk, sec. 6, No. 35, Acts 1898, and at the term in which the decree is made. Sec. 981, V. S.

Case dismissed.

AMELIA E. DAVIS, ADMRX. v. JOHN O. CARPENTER.

May Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON AND WATSON, JJ.

Opinion filed May 23, 1900.

Survival of actions—Action for seduction—An action brought by a father for the seduction of his minor daughter does not survive at common law nor by statute.

Definition—"Personal estate" as used in V. S. 2446—The right of a father to the services of his daughter is not personal estate within the meaning of V. S. 2446. The phrase "personal estate" as used in that section has reference to specific personal property.

ACTION ON THE CASE brought by Richard I. Davis for the alleged seduction of his minor daughter. Bennington County. At the June Term, 1899, the death of the plaintiff was suggested, and subsequently the administratrix of his estate entered to prosecute. At the December Term, 1899, a hearing was had on a

motion to dismiss, *Start*, J., presiding. The motion was sustained and the action dismissed. The plaintiff excepted.

Charles S. Chase for the plaintiff.

O. E. Butterfield for the defendant.

TAFT, C. J. This suit was brought by Richard Davis for the alleged seduction of his minor daughter. After entry in court, the death of the plaintiff was suggested, the administratrix of his estate entered to prosecute and the cause was heard on the defendant's motion to dismiss, for that the cause of action does not survive. The action does not survive at common law, nor by our statute unless it is within that clause of sec. 2446, V. S., which provides that "actions of * * * trespass on the case for damages done to * * * personal estate shall survive." Although a father is entitled to the services of his minor daughter it cannot be said his right thereto is what is meant by the term personal estate, as used in the section of the statute referred to. The term has reference to specific personal property. The court below dismissed the action and its

Judgment is affirmed.

STATE v. JAMES DOHNEY.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and
WATSON, JJ.

Opinion filed April 28, 1900.

Criminal law—Breaking from village lock-up—V. S. 5094—Breaking from a village lock-up is an offense under V. S. 5094 which relates to the breaking of "a jail or other place in which a person is confined by authority of the State."

Same—That the establishment of the village lock-up was later than the original enactment of the statute is immaterial, for there is nothing in the purpose or language of the statute that justifies its limitation to places of confinement already established.

Same—There is no such lack of substantial similarity between the village lock-up and the places of confinement known to the law when the statute was originally enacted as prevents the application of the statute to the village lock-up.

Same—Re-enactment of statute—If the statute as originally enacted were not applicable, it would be necessary to consider the effect of its re-enactment since the village lock-up was established.

V. S. 4481—Person arrested as intoxicated may be detained in lock-up—By V. S. 4481 one arrested as an intoxicated person may be detained in any place within the county, and the general provision for commitment to the lock-up, by officers and other persons having certain process, cannot be held to exclude the lock-up from use as a place for the detention of persons arrested as intoxicated. If a person so arrested is detained in a village lock-up, he is detained in a place of confinement to which the provisions of V. S. 5094 are applicable.

INDICTMENT for breaking from a lock-up in the Village of Northfield. The respondent filed a general demurrer. Demurrer overruled *pro forma* and without hearing, and indictment adjudged sufficient, Washington County, March Term, 1899, *Thompson, J.*, presiding. The respondent excepted, and the cause was passed to the Supreme Court before final judgment.

Richard A. Hoar, State's Attorney, for the State.

Frank Plumley for the respondent.

MUNSON, J. The respondent was arrested as an intoxicated person under V. S. 4481, and placed in the lock-up of the Village of Northfield to be detained until capable of testifying. The indictment is for breaking from this place of confinement while under such detention. It is claimed in support of the demurrer that a village lock-up is not a place of confinement for the breaking of which the statute imposes a penalty, and that even if it be so regarded, there can be no lawful confinement therein except upon process.

The offenses punishable under V. S. 5094 relate to the breaking of "a jail or other place in which a person is confined by authority of the State." This section dates from the laws of 1787, while the village lock-up was first authorized by No. 48, Acts of 1866; and counsel suggest that the lock-up cannot be considered within the provision, because of its later date and its lack of similarity to any place of confinement in existence when the provision was enacted. This argument ignores the re-enactment of the statute of 1787 in revisions subsequent to the act of 1866; but it is not necessary to consider the effect of this re-enactment, for the argument is not sustained by the rules of construction relied upon. The later origin of the lock-up is immaterial, for there is nothing in the purpose or language of the earlier statute that justifies a limitation of its effect to institutions already established. The dissimilarity referred to is not specified, but there is clearly none that can avail the respondent. In the early statutes the clause read, "any jail, or place of confinement, in which any person is confined, * * *." Giving our present statute the construction most favorable to the respondent, it relates to every jail or other place established for the confinement of persons apprehended by the State. The description given determines in what respect the other place must be like the one specifically mentioned, and precludes the application of any technical requirement. Any place then existing or subsequently created for the purpose named is within the scope of the section.

The Act of 1866 authorized village lock-ups for the confinement of persons under arrest, without mention of process. Section 3, No. 63, Acts of 1874, authorized commitments thereto by officers or other persons having certain process. Respondent's counsel argues from this that there can be no lawful detention in a village lock-up without process. We think this conclusion is unwarranted. Section 22, No. 24, Acts of 1852, now V. S. 4481, provides that one arrested as an intoxicated person may be detained "in any place within the county." This provision looks to the convenient and safe detention of intoxicated persons with-

out regard to the character of the place or the ordinary requirements of commitment, and it cannot well be held that the general provision relating to commitments in the lock-up was intended to restrict this comprehensive authority, and exclude from use the places best adapted to meet the purpose of the law. An intoxicated person may be detained in any place, and if detained in a village lock-up he is clearly in a place of confinement to which the provisions of V. S. 5094 are applicable.

Judgment affirmed and cause remanded.

CORNELIUS KILPATRICK v. GRAND TRUNK RAILWAY CO.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, STARR and WATSON, JJ.

Opinion filed March 12, 1900.

Contributory negligence—Defendant's neglect of statutory duty—The rule that contributory negligence will defeat recovery applies whether the negligence of the defendant lies in the disregard of a duty imposed by the common law or by statute.

Same—3886 and 3887—In an action under V. S. 3887, brought against a railroad company by one of its employees for injuries alleged to have resulted from the use on one of the company's cars of a side ladder, and of no other, in disregard of V. S. 3886, contributory negligence on the part of the plaintiff will defeat recovery.

Decisions reviewed—Negligence of plaintiff remote—The decisions in this State under similar or analogous statutes are consistent with the rule here applied. The cases in which it had been held that a plaintiff might recover, notwithstanding negligence on his part, may well be put upon the ground that the plaintiff's negligence was remote.

When negligence is a question of law—When the standard of negligence is not prescribed, the question of negligence becomes one of law if the facts and circumstances in evidence are so decisive, one way or the other, as to leave no room for reasonable doubt or opposing inferences.

The case—In this case the plaintiff, who was injured while attempting to board a moving freight train by means of a side ladder upon one of its cars, was, in view of the evidence reviewed in the opinion, guilty of contributory negligence, as matter of law, under the foregoing rule.

CASE to recover for injuries alleged to have been sustained by the plaintiff, by reason of the fact that one of the defendant's cars, with which the plaintiff had to do as an employee of the defendant, was equipped with side ladders. Plea, the general issue. Trial by jury, Orleans County, September Term, 1899, *Thompson, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

At the close of the evidence the defendant moved the court to direct a verdict in its favor. This motion was overruled.

The court instructed the jury that the effect of V. S. 3886 and 3887 was to exempt the plaintiff from the risks of his employment arising from the use of a ladder on the side of the car in question.

The court submitted the case to the jury with instructions to find a general verdict without reference to the question of contributory negligence.

A special verdict was taken on the question: "Did the negligence of the plaintiff contribute to the accident causing his injury?" To this question the jury answered, "No."

Young & Young and *E. A. Cook* for the plaintiff.

C. A. Hight and *L. L. Hight* and *Chamberlin & Rich* for the defendant.

Taft, C. J. I. The injury to the plaintiff was caused by his attempting to board a moving freight train by means of a ladder placed upon the side of a car. V. S. sec. 3886 reads as follows,—
"No railroad company shall run cars of its own with ladders or steps to the top of the same, on the sides of its cars, but said ladders or steps shall be on the ends or inside of the cars." Section 3887 provides that a railroad corporation, not complying with the requirements of sec. 3886, shall be liable for the damages and

injuries to * * * employees on its roads, resulting from such neglect. By force of the statute, the defendant is liable for any injury to one of its employees resulting from its neglect in not placing a ladder or steps upon the end or inside of the car. The car in question was one belonging to the defendant, and it was its duty, which it failed to perform, to equip it as provided in the section referred to. The plaintiff therefore is entitled to recover, unless barred by the fact that he assumed the obvious dangers of the risk, or, is chargeable with contributory negligence.

As we dispose of the case upon the question of contributory negligence we do not consider whether the plaintiff is barred from recovering by having assumed the obvious dangers of his employment.

The point in respect to the special finding is not insisted upon by the defendant.

II. Did the Court err in ruling that the question of contributory negligence was not in the case?

It is urged by the plaintiff that the case is analogous to one arising under V. S., sections 3871 and 3877 relating to cattle guards, which provide that a corporation owning or operating a railroad shall construct and maintain cattle guards at all farm and railroad crossings, and fences along the right of way sufficient to prevent cattle and animals from getting on the railroad, and making the corporation liable for the damages done by its agents or engines to cattle, horses or other animals thereon, if occasioned by want of such fences and cattle guards.

It was long since held under this statute that a railroad company was liable when a horse, which was killed, was an estray, and had escaped from the pasture through the negligence and carelessness of its owner. There are several cases in the late volumes of the reports which hold the same doctrine. These cases can well be put upon the ground that the negligence of the plaintiff, in permitting his animals to escape, stray away, and pass upon the railroad track, was remote and not proximate. If the negligence of the plaintiff consisted in his negligently driving

cattle upon the track, at the time of the accident, it might well be claimed that such negligence was proximate, not remote, and that his neglect would bar a recovery.

When the negligence of the plaintiff did not occur at the time of the accident, but was prior thereto, and consisted in permitting his animals to stray away, it is not mutual with that of the defendant and was not one of the proximate causes of the accident, for in the use of the words "proximate cause", negligence occurring at the time the injury happened, is meant.

The case in principle is analogous to the one which formerly arose under the provisions of our early statutes, which enacted that "if any special damage shall happen to any person, his team, carriage or other property, by means of the insufficiency or want of repairs of any highway or bridge in any town, which such town is liable to keep in repair, the person sustaining such damage shall have the right to recover the same," etc. In these cases, it has been universally held that if the plaintiff is guilty of contributory negligence, as one of the proximate causes of the accident, if his negligence contributes to his injury to any extent, he is not entitled to recover. But in such highway cases, it was held that when the plaintiff's negligence consisted in taking a road constructed to avoid the dangerous place, which caused the accident, the plaintiff was not barred from a recovery for the reason that his negligence was remote, not proximate. *Templeton v. Montpelier*, 56 Vt. 328.

The question of proximate and remote cause arose in *Davis v. C. V. R. Co.*, 66 Vt. 290, in which the defendant was negligent in not forwarding grain in its elevators at Ogdensburg. The elevators burning without fault on the part of the forwarders, the defendant was adjudged not liable for that the fire was the proximate, and the delay to forward only the remote cause of the damage.

"That a person guilty of contributory negligence should not recover even when the injury arises from neglect to observe a statutory duty is not only reasonable but clear law, for in such a

case the plaintiff has failed to establish the proposition on which alone he is entitled to recover damages—that the injury happened through the defendant's negligence." Beven on Neg. (2nd ed.) 765.

To entitle the plaintiff to recover, the cause of the injury must be the negligence of the defendant and that only. He is entitled to no relief if the injuries resulted from negligence of his own combined with that of the defendant. The rule is the same whether the negligence is by the common law or statutory. The negligence of the statutory duty may involve the person guilty thereof in penalties, yet the law will not allow the injured person to recover because he himself contributes to the injury.

III. Should the question of contributory negligence have been submitted to the jury, or was it one of law? The rule with us is: "When the standard of negligence is not prescribed and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive one way or the other, as to leave no reasonable doubt about it,—no room for opposing inferences. This is clearly shown by the adjudged cases." *Worthington v. C. V. R. Co.*, 64 Vt. 107; *Magoon v. Railroad Co.*, 67 Vt. 177. Can it be said in this case that the facts and circumstances are so decisive as to leave no reasonable doubt about it,—no room for opposing inferences? The plaintiff attempted to climb upon a moving car in a train which was running faster, as he says, than he could run,—moving at the rate of eight or nine miles an hour. It was in the evening, dark, he had a lantern in his hand, and attempted to board the train by getting hold of the ladder and passing upon it to the top of the car. In his first attempt he failed, tried again, and was injured before he could pass up the ladder to the top of the car. There can be but one inference from the testimony in the case, and that is, that the plaintiff was guilty of negligence, in attempting, in the night time, with a lantern in his hand, to board a

freight train running as rapidly as he says this was,—that it must be held to be negligent for any person so to do.

The plaintiff being thus negligent, as matter of law, was not entitled to recover, and the ruling of the court, therefore, that the question of contributory negligence was not in the case was error.

Judgment reversed and cause remanded.

GEORGE I. FLETCHER, EXECUTOR OF SARAH A. FLETCHER, v. O.
W. FLETCHER'S ESTATE.

May Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed May 23, 1900.

Presumption of payment from lapse of time—No presumption of payment arises as matter of law from the lapse of so short a time as ten years.

Proper cross-examination—See opinion.

Petition for new trial—Remittitur—On the hearing in the Supreme Court of a petition by a defendant for a new trial, the plaintiff was allowed to enter a remittitur of the amount of the item to which alone the evidence under the petition related, and to have the judgment below affirmed with the amount of damages so reduced.

Costs—On such disposition of the case the petition for a new trial was dismissed with costs to the petitioner.

APPEAL from the decision of commissioners on the estate of Ormond W. Fletcher prosecuted by George I. Fletcher, executor of the will of Sarah A. Fletcher. The declaration was in assumpsit. The general issue, payment, and other pleas were filed. Trial by jury, Windsor County, June Term, 1899, *Start, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The action was brought to recover \$245, claimed to have been received by Ormond W. Fletcher, as bailee, for the said Sarah in her life-time, and \$183.88 claimed to have been received by him, in a like capacity, after her death for the executor of her estate. The verdict and judgment were for the amount of both sums with interest from October 1, 1898, with costs.

The witness Herrick, referred to in the opinion, was town treasurer of the Town of Chester during a time in which it was claimed that said Ormond W. Fletcher was loaning money to that town. He was called by the defendant.

A petition for a new trial brought by the defendant, and based on the ground of newly discovered evidence, was heard with the case on the exceptions.

The newly discovered evidence consisted of a series of checks and a memorandum making up the sum of \$245, and tending to show the payment to the said Sarah A. Fletcher, in her life time, of the claim of \$245, included in the entire claim sued on.

The plaintiff conceded that the evidence in support of the defendant's petition indicated the payment of the \$245, as claimed by the defendant, and proffered a remittitur of that sum.

Hunton & Stickney for the plaintiff.

Gilbert A. Davis and *George A. Weston* for the defendant.

TART, C. J. Two questions are raised under the exceptions.

I. The first item sought to be recovered was less than ten years old and the court were requested to charge that payment might be presumed from lapse of time. The court omitted to so charge. If a presumption of payment ever arises as matter of law from lapse of time, it never does in so short a period as ten years. It does not arise, as matter of law, short of a period of twenty years; and even then it is but a presumption, subject to be removed by evidence. The request was properly denied.

II. Herrick testified that during the time it was claimed Ormond was holding Sarah's money, he loaned money to the town, thereby rendering it improbable that he kept her money. The

cross-examination made it certain that the transaction was a loan, by showing that a note was given for the money and was an aid, instead of harmful, to the defendant. There was no error in permitting the cross-examination.

The petitionee concedes that in respect to the item of \$245.00 included in the judgment a new trial should be granted, and proffers a remittitur of that sum from the judgment. There is no testimony in support of the petition for a new trial in respect to the sum of \$183.88. Therefore if a remittitur is entered, judgment may be affirmed with damages of \$183.88 with interest since 1 Oct., 1898, and costs—and ordered certified to the Probate Court.

The petition for a new trial dismissed, with costs to the petitioner.

ALEXANDER SARTWELL v. ALBERT SOWLES AND WILLIAM LADD.

May Term, 1899.

Present: ROWELL, MUNSON, START, THOMPSON, AND WATSON, JJ.

Opinion filed May 24, 1900.

*Motion to dismiss—Oral evidence as to true date of writ—*It appearing on the face of a writ that its date had been altered, evidence to show the true date of its issue was admissible under a motion to dismiss.

*Res judicata—*A judgment of a justice having been vacated in an action of *audita querela* on the ground of want of jurisdiction in the justice, the question of his jurisdiction was *res judicata*.

*Ejectment—Justice without jurisdiction except under V. S. 1560—Title to land concerned—*The object of an action of ejectment proper is not only to recover the possession of land, but also to settle and establish the title thereto, and as the title to land is necessarily involved a justice has no jurisdiction of such action.

*No justification under process void on its face—*A writ of possession which shows that the judgment on which it was issued was rendered by a justice, and was for the plaintiff to recover "his title and posses-

sion" shows a judgment which it was without the jurisdiction of the justice to render, and affords no justification to any one acting under it.

Statute of Frauds a rule of evidence—Waiver by not objecting—If a contract is proved by oral evidence not objected to, the Statute of Frauds is waived.

Submission to arbitration revocable before award—Agreement not to revoke ineffective—A submission to arbitration may be revoked by either party at any time before an award is made and published, notwithstanding an agreement not to revoke, and the submission when revoked is no bar to an action.

Refusal of trial court to set aside verdict for excessive damages not revisable—The action of the County Court in refusing a defendant's motion to set aside a verdict on the ground of excessive damages is not revisable in the Supreme Court.

Award of certified execution discretionary—The award of a certified execution rests largely in the discretion of the County Court upon the facts found by it, and when made, in the exercise of such discretion, is not revisable in the Supreme Court.

Evidence conformable to issues—When a defendant justifies under a writ of possession issued upon the judgment of a justice, the judgment and writ of possession and proceedings in *audita querela* setting aside the judgment are material evidence.

Oral lease for a term of years—Tenancy at will—Tenancy from year to year—An oral lease for a period of years creates a tenancy at will, with a right of possession in the lessee so long as he is allowed to occupy, and such a tenancy may ripen into a tenancy from year to year. A request for a charge inconsistent with the law in this respect was properly disregarded.

TRESPASS. Pleas, the general issue, *liberum tenementum* and justification under legal process. Trial by jury, Franklin County, September Term, 1898, Tyler, J., presiding. Verdict and judgment for the plaintiff. The defendants excepted.

Before the case came on for trial a motion to dismiss for want of jurisdiction was heard and overruled. It appeared by the writ and was conceded that the date of the writ had been altered. On evidence received subject to objection, the court found that the blank writ was filled out on June 7, 1898 and that date inserted, but that the recognizance was taken by the justice on June 17, 1898, and the writ then issued by him, and that at

that time the date was changed to June 17, 1898 and that that was the true date of the issue of the writ.

On the trial by jury, it appeared that in April, 1893, the plaintiff and the defendant Sowles made an oral contract by which the plaintiff was to carry on, upon shares, a dairy farm in Swanton belonging to an estate of which the defendant Sowles was administrator. The plaintiff's evidence tended to show that the contract was for five years, while that of the defendants' tended to show that it was for one year only, and that at the end of a year it was extended to April 1, 1895.

The plaintiff took possession of the farm under the contract and carried it on until June 7, 1895, when he was ejected as hereinafter stated. The evidence of the defendant Sowles tended to show that in February, 1895, he told the plaintiff he was not have to the farm another year. This the plaintiff denied.

May 7, 1895, the defendant Sowles, as administrator brought an action of ejectment against the plaintiff returnable before a justice of the peace. On the return day of the writ, May 14, 1895, the defendant in that suit proved to dismiss the action on the ground that the justice was without jurisdiction, but this motion was overruled, and the plaintiff in that suit recovered judgment for the seisin and peaceable possession of said farm and a writ of possession thereon.

The proceeding before the justice was not justice's ejectment so-called, under V. S. 1560 and the following sections, but an action of ejectment proper, the writ being in accordance with V. S. 5417, Form 24, and the writ of possession in accordance with Form 5 of the same section.

Shortly after the judgment was rendered the parties agreed to submit their differences to arbitration, said Sowles giving a bond to abide by and perform the award, and both parties agreeing not to revoke. After a partial hearing before arbitrators said Sowles revoked the submission, and on June 5, 1895, took out the writ of possession above referred to. This writ was put into the hands of the defendant Ladd as deputy sheriff to serve, and

June 10, 1898, both defendants went to the farm in question and the defendant Ladd then quietly and peaceably moved the plaintiff's goods therefrom into the highway and put the defendant Sowles into the possession of the farm. The testimony of the defendant Ladd tended to show that he acted in good faith in reliance upon the validity of the process in his hands. At the April Term, 1898, of the Franklin County Court the judgment of the justice above recited was vacated in an action of *audita querela*.

In this case against the objection of the defendants the plaintiff introduced in evidence the judgment of the justice, the writ of possession, and the proceedings on *audita querela*. At the close of the testimony each defendant moved for a verdict in his favor. Both motions were overruled. The court held that the writ of possession and the judgment upon which it was issued were void, and that the defendants were trespassers and liable for actual damages.

The defendants' ninth and tenth requests to charge, and the first separate request of the defendant Ladd, were based on the claim that the writ of possession was proper in form, and on its face appeared to have been regularly issued in a proceeding of which the magistrate had apparent jurisdiction which he had properly exercised. The defendants' twelfth, thirteenth and fourteenth requests to charge, were based on the claim that by virtue of the terms of the agreement of submission to arbitration, prospective profits from the farm could not be considered in arriving at the amount of damages.

The jury found specially :

That the contract of lease was for five years ; that the damages to the plaintiff from the moving of his goods into the highway were \$36.50 ; that the plaintiff's damages in consequence of his not occupying the farm for the year from April 1, 1895 to April 1, 1896 were \$300 ; that the plaintiff's damages in consequence of his not being permitted to occupy the farm until the end of the term of five years were \$400.

The court rendered judgment for \$336.50, the plaintiff electing to take a judgment for that sum, and a certified execution was awarded.

E. A. Ayers and *C. G. Austin* for the plaintiff.

E. A. Sowles, *Willard Farrington* and *A. A. Hall* for the defendant.

WATSON, J. The evidence to show the true date of the writ was admissible, and the motion to dismiss, for want of jurisdiction, was properly overruled. *Hopkins v. School District*, 27 Vt. 281.

After the plaintiff had been in possession of the farm for more than two years, carrying it on under his contract, defendant Sowles, as administrator of the estate of William L. Sowles, brought his action of ejectment in the statutory form—not a justice ejectment under the forcible entry and detainer act,—against the plaintiff, returnable before a justice of the peace, but in the declaration his seisin and possession were alleged to be in his own right in fee, and not in his representative capacity. Judgment was rendered for the plaintiff therein to recover the seisin and peaceable possession of the farm in question, and a writ of possession was issued upon that judgment.

The writ of possession was put into the hands of defendant Ladd, a deputy sheriff, for service, whereupon the defendants went to the farm, and Ladd quietly and peaceably moved the household goods and other personal effects of the defendant therein, into the highway and put Sowles into possession of the farm; and Ladd seeks to justify his acts in this behalf, in the suit at bar, under the writ of possession.

The plaintiff, in this suit, contends that the justice had no jurisdiction of the subject matter, and therefore the writ of possession affords no justification.

At the April Term, 1898, of Franklin County Court, the judgment of the justice was vacated in an action of *audita querela* brought for that purpose, and it was adjudged therein that the justice was without jurisdiction of the subject matter, and

the judgment of the justice and the writ of possession thereon were set aside and held for naught. No exception was taken thereto, and the question of want of jurisdiction in the justice, thereby became *res judicata*.

But it is said that Ladd, not being a party to the action of *audita querela*, is not affected by the judgment therein. Assuming, but not deciding, this to be so, we examine the question as to whether the justice had jurisdiction.

The object of the action of ejectment in this State, being not merely to recover the possession of lands, but to settle the title and establish the right of property, and the judgment, when recovered, being, as between the parties, their heirs and assigns, conclusive evidence of that title—V. S. 1492; *Payne's Administrator v. Payne*, 29 Vt. 172; *Marvin v. Denison*, 20 Vt. 662—the plaintiff in the action before the justice, in order to recover, was obliged to show title in himself to the land in question, which is conclusive that the title to land was involved within the meaning of section 1040, V. S., as held in *Jackway v. Barrett*, 38 Vt. 316, and in *Dana v. Sessions*, 63 Vt. 405. Clearly the justice was without jurisdiction.

The grounds of the defense made, rendered the judgment of the justice, the writ of possession, and the proceedings in relation to the action of *audita querela* material, and the same were admissible in evidence.

At the close of the evidence, each defendant moved for a verdict, but it does not appear from the exceptions that any grounds were stated upon which the motions were based, and therefore, in disregarding them, there was no error. *State v. Nulty*, 57 Vt. 543.

The court held that the writ of possession and the judgment upon which it was issued, were void; that the defendants were trespassers and liable for actual damages, to which holding the defendants excepted.

The justice being without jurisdiction of the subject matter, as hereinbefore shown, not only was the judgment void, but the

writ of possession issued thereon was void, also. It has been argued in behalf of defendant Ladd that notwithstanding the judgment and writ of possession were void, inasmuch as a writ of possession may be issued by a justice upon a judgment in an action under the forcible entry and detainer act, the officer would not know but that the writ in question was thus issued, and therefore it affords justification for his acts under it.

In actions of ejectment, if judgment is rendered for the plaintiff, he shall recover his damages and the seisin and possession of the premises. V. S. 1491. And the prescribed form of the writ of possession to be used upon such a judgment states that, by the consideration of the court named therein, the plaintiff has recovered judgment for his title and possession of and in the realty therein described. V. S. 5417, Form 5.

In actions before a single justice under the forcible entry and detainer act, against a tenant holding over without right, exclusive of rents and costs, the plaintiff can have judgment only for the possession of the premises, and a writ of possession shall issue accordingly. V. S. 1563. The clause that a writ of possession shall issue accordingly, means that the writ shall be so drawn in form and substance as to comply with the law upon which the action is based, and that it shall be within the scope of the judgment upon which it is issued.

It appeared by the writ of possession under which defendant Ladd acted, that the judgment on which it was issued was rendered by the subscribing justice, and that it was for the plaintiff to recover his title and possession of the farm in question. The law permitting such a judgment to be rendered was without the jurisdiction of the justice; and the defendant was bound to know the law.

The writ, therefore, was not fair on its face, and afforded no justification to any one acting under it. *Driscoll v. Place*, 44 Vt. 252; *Carleton v. Taylor*, 50 Vt. 220. It follows that the defendants were trespassers and liable for actual damages, as held by the court, and that their ninth and tenth requests to charge,

and defendant Ladd's first request, were unsound and properly refused.

Whether the contract was within the statute of frauds, need not be considered; for, if it was, the defendants have waived that defense by allowing the contract to be established by parol evidence without objection, and it must be enforced as proved. *Montgomery v. Edwards*, 46 Vt. 151; *Battell v. Matot*, 58 Vt. 271; *Pike v. Pike*, 69 Vt. 535.

The defendants' second request to charge was as follows: "If the jury find that the plaintiff leased the premises without writing for five years, as plaintiff's evidence tends to show, still the defendant as administrator would be in the lawful possession of the premises, by his servant, the plaintiff, under the circumstances at the time of the alleged ejectment from the premises as his testimony tends to show, and this action could not be sustained."

Such a lease would have had the effect of creating an estate at will—V. S. 2218—with the right of possession in the lessee as long as he was allowed to occupy and carry on the farm thereunder; and such an estate may ripen into a tenancy from year to year, thereby entitling the lessee to six months notice to quit before yielding possession of the premises to the lessor. *Amsden v. Atwood*, 69 Vt. 527; 67 Vt. 289. This request was unsound in principle, and properly disregarded.

Defendants contend that, by reason of the submission to arbitrators, the plaintiff is barred from maintaining this action, and that his only remedy is upon the bond given by the defendant Sowles, to abide and perform the award. This contention is untenable. Notwithstanding the agreement not to revoke the submission, either party had the right so to do at any time before an award was made and published. *Aspinwall v. Tousey*, 2 Tyler, 328; *People v. Nash*, 111 N. Y. 310, 7 Am. St. Rep. 747. And when the submission was revoked, it was no bar to this action. Chit. on Con. 884; *Day v. Essex County Bank*, 13 Vt.

97. Therefore, in refusing to comply with defendants' twelfth, thirteenth and fourteenth requests, there was no error.

The action of the County Court in overruling defendants' motion to set aside the verdict on the ground that the damages were excessive, is not revisable here. *Sowles v. Carr*, 69 Vt. 414.

The granting of a certified execution, rested largely in the discretion of the County Court upon the facts found by it, and is not revisable in this court. *Melendy v. Spaulding*, 54 Vt. 517.

This disposes of all the questions raised by the exceptions in which defendants, in argument, claimed there was error, and none other are considered.

Judgment affirmed.

Start, J. dissents.

MITCHELL LAMBERT v. THE MISSISQUOI PULP CO.

October Term, 1898.

Present: ROSS, C. J., TYLER, MUNSON, START AND THOMPSON, JJ.

Opinion filed May 24, 1900.

*Master and servant—Safe place in which to work—*Places prepared by workmen for their own temporary use as instrumentalities in carrying on their work, are to be distinguished from places prepared by the master through the agency of one class of workmen for the occupancy of another class in the carrying on of some employment.

*Master and servant—The provision of a staging does not pertain to the duty of the master—*A staging used in the erection of a building is not to be regarded as a place in which to work provided by the master but as an instrumentality which the workmen upon the building themselves provide as a means of carrying on their work.

*Master and servant—Staging—Master's liability in respect to material furnished—Non-liability in respect to construction—*The master is responsible for the

sufficiency of the material furnished for the construction of a staging, but the fellow-servant doctrine relieves him from liability in respect to a defect in the construction itself.

*Fellow-servant—A foreman is a fellow-servant in construction of staging—*One who is a foreman, in respect to work upon a building, is, in respect to the erection of a staging for carrying on such work, a fellow-workman of all who are engaged in the work upon the building, whether or not they actually engage in the erection of the staging.

*Fellow-servant—Workman who begins after staging is built—*A workman, who, after the staging is built comes upon a job as a fellow-workman of those who have built it, in pursuance of the general work upon which they are engaged, assumes the same risks in respect to it as those borne by the other workmen.

*Contributory negligence—Duty of after-employed workman in respect to staging—*A workman, so coming upon a job of building after the staging is constructed, has no right to proceed upon the assumption that the staging is safe until he is put upon his guard concerning it ; but it is his duty from the start, to exercise caution with regard to the character of the structure in respect to safety.

*Contributory negligence—Incompetent fellow-servant—*A master is liable to a servant for injuries to such servant caused by the negligence of an incompetent fellow-servant whom the master has negligently employed ; but this doctrine, when applicable, does not enable the injured servant to recover, in an action against the master, if such servant was guilty of contributory negligence.

*Contributory negligence—Finding under erroneous instructions not determinative—*A verdict of a jury that involves a finding that a plaintiff was not guilty of contributory negligence is not determinative of that question, if the theory on which the case is submitted to the jury, by instructions excepted to, is not only erroneous in itself, but is harmful to the defendant in its bearing on the question of contributory negligence.

*Contributory negligence here a question for the jury—*In this case, on the testimony, the question of contributory negligence on the part of the plaintiff was one of fact for the jury, and the defendant's motion for a verdict on that ground was properly overruled.

CASE. The defendants were partners doing business under the firm name of the Missisquoi Pulp Company. Plea, the general issue. Trial by jury, Franklin County, March Term, 1898, *Rowell J.*, presiding. Verdict and judgment for the plaintiff. The defendants excepted.

The action was brought to recover of the defendants for an injury sustained by the plaintiff while in their employ by reason of their alleged negligence in not providing for him a safe staging on which to work, in connection with others, in the construction of a certain mill.

That part of the charge of the court set out in the bill of exceptions was as follows:

"For the purposes of this trial I instruct you that it was the duty of the defendants to supply a reasonably safe staging for the plaintiff to do this work upon, and if they were at fault in that regard and he was injured by reason thereof, he himself not being in legal fault that contributed to his injury, then he is entitled to recover. I say it was the duty of the defendants to supply such a staging. It is conceded by the defendants that the staging was not of that character; that it was not suitable and safe for the purpose of putting those timbers in place upon the wall; yet if they were in legal fault in this regard, the plaintiff cannot recover if his negligence contributed in any degree to the happening of the accident that produced the injury."

The jury returned a general verdict for the plaintiff, and found specially that the defendants' foreman, one Whitney, was not a competent and suitable man for foreman, and that the defendants did not exercise the care and prudence of a careful and prudent man in putting him into that position. They also found specially that the defendants furnished material suitable in quality and quantity for the erection of a suitable staging in connection with the work of constructing the mill.

The questions discussed in the opinion arose upon the *pro forma* overruling of a motion by the defendants to have a verdict directed in their favor, upon the denial by the court of certain requests to charge and upon the charge as given.

D. W. Steele and *Farrington & Post* for the plaintiff.

C. G. Austin for the defendants.

MUNSON, J. The plaintiff, a carpenter of long experience, was employed by the defendants to work in the construction of their mill, and was placed under the superintendency of one Whitney as foreman. He was injured by the breaking down of one section of a long staging, built before he came upon the job by the force of workmen which he joined. This structure was insufficient in that the cross-pieces upon which the planks rested were fastened to the standards with nails of insufficient size, left with their heads a quarter of an inch or more from the wood. A few hours before receiving his injury, the plaintiff was sent to repair the staging where it had been broken by the falling of a man upon it from a height of several feet, and found that the break was caused by the pulling off of a cross-piece, and re-nailed the piece. His own injury resulted from the pulling off of a cross-piece about sixteen feet from the place so repaired. This occurred while the plaintiff and three others were carrying a stick of timber along the staging. Before going upon it with the timber, the plaintiff asked Whitney if the staging was safe to work on, and Whitney replied that it was all right if not loaded down with timbers, and told the plaintiff to go on with his work and not ask so many questions. The plaintiff testified that he made this inquiry because he thought the staging looked rather shabby and uneven.

At the close of the evidence the defendants moved that a verdict be directed in their favor on the ground that the plaintiff had not made out a case entitling him to recover, which motion the court overruled *pro forma*. This saved the question whether the plaintiff, upon his own showing, was guilty of contributory negligence. The writer of the opinion is inclined to think that the defendants were entitled to have a verdict directed, on the ground that the plaintiff had repaired an injury to the staging of such a nature, and so caused, that the repairing could not have failed to call the attention of a prudent and experienced mechanic to the improper construction and weakness of the structure. But

a majority of the court are satisfied that there was a case for the jury.

The court, for the purposes of the trial, charged that it was the duty of the defendants to furnish a reasonably safe staging for the plaintiff to do his work upon. The general rule requires that the master provide for his servant a reasonably safe place in which to work. The question is whether a structure of this character is within the general rule. It has been held not to be, in a number of well considered cases in other states, and we think upon sufficient ground. There is a plain distinction between places prepared by the master through the agency of one class of servants for the occupancy of another class in some employment to be therein carried on, and places prepared for temporary use in the erection of a building by those employed for that work. The latter are not places in which to work in the ordinary sense of the term, but instrumentalities which the workmen themselves provide as means of carrying on the work they are employed to do. It was the duty of those employed to build the defendants' mill to erect whatever staging was necessary to their undertaking. The defendants were responsible for the sufficiency of the materials provided for the staging, but not for the manner in which their workmen used them. 1 Shear. & Redf. on Neg. 317.

The case presents the further question whether a staging is within this rule as to a workman who comes upon the job after it is built. It is true that the plaintiff sustained no relations to the defendants or their workmen while the staging was being built, and that as far as his service, considered individually, was concerned, he went to work upon it as a place prepared for his use. But the plaintiff's service involved no use of the staging that was independent of the work of construction, and it had been prepared, not by the master as something which he undertook to provide for the plaintiff, but by his workmen as a part of the general work which they had undertaken to do, and upon which plaintiff entered. We think that in associating him-

self with these workmen for the completion of the building by the use of the staging already erected, the plaintiff assumed the risks which attached to the workmen generally. The test of the master's liability is not whether the servant came before or after the staging was built, but the relation which the structure sustained to the relative duties of master and servant. It was said in *Hogan v. Smith*, 125 N. Y. 774, that the fact that the workman came after the standing-place was erected simply tended to free him from the charge of contributory negligence, but did not alter the relation which the master sustained to his servants and their work. It is true that some of the reasoning of that case would be inapplicable to this, because of the different facts involved. In that case the platform fell short of completion because of the failure to lay down some additional planks, while in this the platform was complete in all its parts, but insecurely put together, and that because of the personal directions of the foreman. But when it is held that it was the duty of the workmen to provide the staging as an incident of their employment, the relation of the foreman to that part of the work is determined. It was not a matter regarding which the master owed an exceptional duty because of its requiring the direction of one specially skilled. The points wherein the structure failed were matters within the knowledge of all experienced carpenters. In the erection of the staging, Whitney was the fellow-servant of all who worked upon the job, whether actually engaged in its erection or not.

It is true that a master is liable to his servant for injuries caused by the negligence of an incompetent fellow-servant whom he has negligently employed, and that it appears from special findings that Whitney was not a competent person to have charge of this work and that the defendants ought to have known it. But the judgment cannot be sustained on these findings, for the plaintiff could not recover on any ground if guilty of contributory negligence, and the finding that he was not thus guilty was under instructions applicable to the case as submitted, but not such

as the defendants would otherwise have been entitled to. The jury were left to consider the conduct of the plaintiff upon the theory that he had a right to assume that the staging was safe until something came to his notice from which he ought to have known that it was unsafe. In this view, the plaintiff's duty to exercise caution as regards the character and safety of the structure commenced only when he was put upon his guard concerning it. But if it was not the duty of the defendant to furnish a safe staging, the plaintiff had no right to proceed upon the assumption that it was safe, but was bound to consider the question of its safety from the start. The theory upon which the case was submitted was not only erroneous in itself, but harmful to the defendants on the question of contributory negligence.

Judgment reversed and cause remanded.

PETER GARROW v. CHARLES MILLER.

May Term, 1900.

Present: ROWELL, MUNSON, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed May 24, 1900.

Master and servant—Rule as to provision of a safe place does not apply to a staging—The rule requiring the master to furnish his servant a safe place in which to work is not applicable to a staging built and used by employees as an instrumentality for carrying on the construction of a building. See the next preceding case.

Master and servant—Relation of master to defective part of staging alone material—In an action by a servant against his master for negligence in providing an insufficient staging, the fact that the master personally erected a part of the staging is immaterial, when it is not claimed that what he built was insufficient.

Master and servant—Fellow-servant—Foreman a fellow-servant of other workmen in erection of staging—The fact that the staging, through the defective

character of which the plaintiff's injury was caused, was constructed, in the absence of the defendant, by and under the direction of an experienced employee of the master, who took charge of the work, is immaterial. In the erection of the staging such employee was not a representative of the master but a fellow-servant of the plaintiff.

The fellow-servant doctrine stated—A master cannot be held for injuries sustained through the negligence of a competent fellow-servant.

CASE. Plea, the general issue. Trial by jury, Addison County, June Term, 1899, *Taft*, C. J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

The action was brought to recover for injuries alleged to have been caused by the negligence of the defendant in not providing for the plaintiff, his employee, a safe place in which to work.

It appeared that the plaintiff was seriously injured by the falling of a staging upon which, with others, he was at work in the employ of the defendant in the erection of a building in the Village of Bristol. The defendant had himself put up certain uprights which supported the staging, but it was not claimed there was any defect or insufficiency in the part of the staging so constructed by him.

It appeared that a part of the staging was defective, and that this part was constructed, in the absence of the defendant, by and under the direction of one Sorrell, an experienced workman in the employ of the defendant upon the job of building. There was evidence tending to show that Sorrell acted as the foreman of the defendant in the absence of the latter, who was away about one-third of the time.

The plaintiff claimed that the staging was insufficient on account of a defect in one of the cross-pieces, and the lack of a suitable number of cross-pieces. One of the cross-pieces had in it, near the middle, two knots, one of which was plainly discernible on its upper side as it lay in its position in the staging, while the other could not readily be seen except by an examination of that side of the cross-piece which was its under side when it had

been put into the staging. Each of the two knots extended across the stick used as a cross-piece, and being in close proximity, greatly impaired its strength. The evidence tended to show that this cross-piece which was in the center of the staging broke where the knots were and that the staging fell to the ground carrying the plaintiff with it.

The plaintiff claimed that the negligence arose in the performance of a duty for the careful discharge of which the defendant became responsible when he assumed the relation of master to the plaintiff, and that Sorrell was the defendant's vice-principal charged with the master's duty to provide a safe place for the plaintiff to work in.

The defendant claimed that, if the plaintiff's injury was caused by anyone but himself, it was caused by the negligence of a fellow-servant, and on this and other grounds moved for a verdict at the close of the plaintiff's case. This motion was denied upon the ground that the defendant might be liable for furnishing insufficient material, but the court held that any defect in the construction of the staging or any negligence in the selection of material was the negligence of a fellow-servant.

In the charge the court said: "If the platform was negligently constructed in the respects indicated, and insufficient, and would have fallen if the broken piece had been a sound piece, then the neglect was in the construction of the platform, and the neglect was the neglect of the workmen and not the neglect of the master. It was, in other words, the neglect of a fellow-servant. * * *

"And if that was true in this case, and you find that this platform was defective and would have fallen in any event, the defendant is not liable; but if the staging was properly built in all respects besides this broken piece, and sufficient in all other respects, the question then arises: were the workmen negligent in taking that piece of lumber and putting it into the staging in the way, and for the purpose, that they did do it? It was their duty to examine any timber they put into the staging, especially

a piece which served the purpose of supporting the whole platform, or any part of it. * * * If this defect was visible, if a prudent man under the same circumstances would not have used the stick for that purpose, would have rejected it, then it was negligence on the part of the men putting it into the place which they did, and for the purpose for which they used it. And it would be the negligence of the workmen and not that of the defendant, and under these circumstances the plaintiff cannot recover."

F. L. Fish for the plaintiff.

W. H. Bliss for the defendant.

MUNSON, J. The general rule which makes it the duty of the master to provide for his servant a reasonably safe place in which to work, is not applicable here. A staging built and used by employees engaged in erecting a building is not a place provided by the master for his servants to work in, but an instrumentality provided by the servants as a means of carrying on the work they have undertaken to do. *Lambert v. Missisquoi Pulp Co.* 72 Vt. 278. The fact that the defendant personally erected a part of the staging is unimportant, for it is not claimed that what he built was insufficient. The part which caused the plaintiff's injury was constructed during the defendant's absence by and under the direction of one Sorrell, an experienced workman, who acted as foreman when the defendant was away. In doing this work, Sorrell was not a representative of the defendant, but a fellow-servant of the plaintiff; for the act was one pertaining to the undertaking of the workmen and not to the duty of the master. A master cannot be held for injuries sustained through the negligence of a competent fellow-servant.

Judgment affirmed.

ISAAC T. PATERSON v. LUMAN H. SMITH, JOHN P. CONNOR AND
EDWARD KILGARLAN.

January Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, START, and WATSON, JJ.

Opinion filed May 24, 1900.

Practice in Supreme Court—Discharge in insolvency—V. S. 2071—Although new issues cannot be formed in the Supreme Court in a case there on exceptions, yet, when it appears that in such a case the defendant is entitled to any benefit from a discharge in insolvency in proceedings begun after final judgment in the court below, the Supreme Court will take such action as will give the defendant the benefit of his discharge that V. S. 2071 was intended to secure to him.

Discharge in insolvency—Effect of discharge upon claims for conversion of property—V. S. 2074—V. S. 2138—A claim for the conversion of property is provable against the estate in insolvency of the tort-feasor and, if proved, an action thereon is barred by a discharge. If such claim is not so proved, an action thereon is not barred, the claim not being founded on contract.

Claim based on conversion—Nature of claim not affected by merger in judgment—When a claim for the conversion of property is merged in a judgment, the primary nature of the claim is not changed, and, in respect to the effect upon it of a discharge in insolvency, it will still be regarded as resting upon tort and not upon contract.

Joint judgment for conversion—Discharge in insolvency of one judgment debtor—When a judgment has been obtained for the conversion of property against tort-feasors jointly, proof of the judgment against the estate in insolvency of one of the defendants, and a discharge granted to him, do not have the effect of releasing the others.

The case—Application of the foregoing principles—In this case, upon a showing that proceedings in insolvency were begun as to all the defendants, three in number, after final judgment in the court below, rendered against them jointly for the conversion of property, and that the judgment had been proved against the estate of one defendant and a dividend thereon paid, the case was as to that defendant ordered to stand for further consideration. It further appearing that the judgment had not been proved against the estate of either of the other defendants, it was ordered that the case be determined as to them upon the exceptions, upon the entry, by the plaintiff, of a remittitur for the amount of the dividend received.

TROVER. Trial by jury, Orleans County, September Term, 1893, *Taft*, J., presiding. Verdict and judgment for the plaintiff. The defendants excepted.

At the January Term, 1894, of the Supreme Court, a stay of proceedings was granted on a motion setting up the filing of petitions in insolvency by the defendants after the rendering of judgment in the County Court. Thereafter the case was continued from term to term and pleas and demurrers were filed as stated in the opinion.

W. W. Miles and *John Young* for the plaintiff.

Bates, May & Simonds for the defendants.

WATSON, J. This action is trover for the conversion of certain lumber, and judgment was rendered therein against the defendants jointly, at the September Term, 1893, of Orleans County Court, and upon defendants' exceptions the cause came into this court at the October Term following. Subsequently thereto, and while the cause was pending upon the exceptions, the defendants pleaded, severally, a special plea of *puis darrein continuance*, in bar.

The plea of defendant Smith sets forth, in substance, that the cause of action was for the wrongful taking, withholding, and converting of certain lumber by the defendants, and for no other cause of action, and that the judgment rendered in the County Court was based solely upon such wrongful taking, withholding, and converting of said lumber; that on January 23, 1894, the said defendant filed his petition in the Court of Insolvency, therein praying to be adjudged an insolvent, and for the benefits of the law of insolvency, and that he was, by said court, adjudged insolvent; and, in short, that he was granted a discharge by that court on December 28, 1896, from all debts he owed at the time of filing his petition, and from the debt involved in this suit; and praying judgment thereon in the common form.

The plaintiff craved oyer of the record of the list of debts proved, in the the Court of Insolvency, against the estate of the

said defendant, and, upon its being granted, demurred generally and specially to the plea. The several pleas of the other defendants were similar, and to Kilgarlan's plea, the plaintiff, in like manner, cravedoyer and demurred.

At common law, a plea *puis darrein continuance* must be pleaded at the next term of the court after the new matter of defense arises, and if not thus pleaded, the new matter is waived, and cannot afterwards be pleaded,—Gould's Pl. VI, sec. 124—but by statute, such matter may be pleaded, by leave of court, at a subsequent time. V. S. 1155. Nor, at common law, can the defendant thus plead after verdict found, for all pleading is then at an end—Gould's Pl. VI, sec. 124; 1 Chitty's Pl. 659; and in this regard, the rule is not changed by the provisions of V. S. 1155.

As has been many times said, the Supreme Court is a court of error, and a case can there be heard only upon the questions passed upon by the court below, and brought before it upon exceptions.

New matter of defense properly set forth in a plea *puis darrein continuance*, would be traversable, and, if traversed, evidence not before admissible, and a trial upon the issue thus formed, would be necessary. In the case at bar, a trial was had by jury, and if a trial were to be had upon an issue formed upon this new matter of defense, there is no reason why the parties would not be entitled to a similar trial upon that, also. But new proof cannot be made, nor new facts introduced even by record, in the Supreme Court. *Blake v. Tucker*, 12 Vt. 39; *Adams v. Gay*, 19 Vt. 358. And for stronger reasons, new issues of fact cannot be formed, and a trial there had upon the merits.

In this same case, 66 Vt. 633, it was held that the provisions of the law that after the filing of a petition in insolvency until the question of discharge has been determined, no creditor, whose debt is provable against the insolvent estate, shall be allowed to prosecute to final judgment a suit therefor, at law or in equity, against the insolvent debtor, and that any such suit shall,

on the application of the debtor, unless he has unreasonably delayed seeking a discharge, be stayed to await the determination of the Court of Insolvency on the question of discharge,—V. S. 2071—were applicable to all provable claims before final judgment, including such claims in suits pending in this court on exceptions. But the law applied to suits pending in this court is of no practical benefit to the debtor, unless he can avail himself of his discharge when granted, in the suit thus stayed. This law should have practical force within its full scope of application; and, although such defense cannot be pleaded after verdict and while the case is pending in this court on exceptions, the proper administration of justice requires that a defendant should have an opportunity to make such defense at any time before the case passes to final judgment on exceptions; for otherwise, he might, to that extent, be deprived of the benefits of his discharge. If the debt or claim involved in the suit is such that his certificate would discharge him therefrom, and he waives his exceptions, he should be given the benefit of his discharge as soon as the law will permit in the circumstances of the case.

In *Bank of Bellows Falls v. Onion*, 16 Vt. 470, the plaintiff recovered judgment in the County Court, and the case came before the Supreme Court upon exceptions by defendant. The defendant there moved that the judgment be reversed *pro forma*, and the case remanded to the County Court to enable him to plead in bar, his discharge in bankruptcy, procured by him subsequent to the final trial in the County Court. It was held to be a proper case for the exercise of discretionary powers, and judgment was reversed *pro forma* that the defendant might plead *de novo*. It would seem that a similar practice obtained in Massachusetts. *Lewis v. Shattuck*, 4 Gray, 576.

But this practice is not universal. The case of *Parks v. Goodwin & Hand*, 1 Mich. 35, shows that judgment had been recovered by Goodwin & Hand, in the Circuit Court, against Parks, who carried the case to the Supreme Court, on writ of error, where the judgment was affirmed. Between the argument of the cause

in the Supreme Court and the decision affirming the judgment, Parks was discharged in bankruptcy, and in this case moved for a perpetual stay of execution. In determining the motion, the court, after referring to the fact that the bankrupt law had made no provision in respect to the mode of procedure in a case situated in this way, said: "The defendant in the court below having been thus discharged, it would seem that some mode ought to be devised by which effect should be given to his discharge. Had he been present when the opinion of this court was announced and entry of affirmance directed, and suggested his discharge in bankruptcy, this court would either have suspended its judgment, or, having directed the judgment of the court below to be affirmed, would at the same time have given the party the rights secured to him by his discharge, and directed a stay of proceedings;" and that such would be "but the exercise of an equitable power over its own judgments which courts of law possess."

In *Imloy v. Carpentier*, 14 Cal. 173, after consideration of both English and American authorities, it was held that the court was invested with plenary powers over an execution, and may set it aside, order a perpetual stay, or make any other order with reference thereto, required for the protection and preservation of the rights and interests of the respective parties.

In New York, it is held that if the bankrupt has no opportunity to plead his discharge, he has no means of availing himself of it except by motion, and that he is entitled to a perpetual stay of execution. *Graham v. Pierson*, 6 Hill, 247.

If no question is made as to the validity of the discharge, and it affects all matters that entered into the judgment, no good reason is apparent why, if a defendant has not had an opportunity to plead his discharge, and waives his exceptions, this court may not on motion suspend judgment, or, if judgment be affirmed, order a perpetual stay of proceedings, or of execution, according to circumstances. But if the validity of the discharge, or the extent of its effect, is in question, the case may be remanded to the County Court with or without a *pro forma* reversal of judgment, as justice

may require, to be there proceeded with under the order remanding it. V. S. 1633.

But such power should not be exercised unless it is made to appear, with reasonable certainty, that the petition was filed in the Court of Insolvency after the verdict, and that the debt or claim involved in the suit is such as will be affected by the defendant's discharge under the insolvency law. *Gardner v. Way*, 8 Gray, 189. It therefore becomes necessary to examine the nature and foundation of the cause of action in the suit at bar.

In insolvency proceedings, claims against the debtor for or on account of goods, chattels, or other property wrongfully taken, withheld, or converted by him, may be proved and allowed as debts against his estate. V. S. 2074. And the debtor shall, upon the issuing of the certificate, except as otherwise provided, and with the limitations specified, be discharged from debts proved against his estate, and from debts provable under the law and founded on a contract. V. S. 2138.

Prior to any of the proceedings in the Court of Insolvency, the plaintiff's claim was reduced to a judgment, and thereby became liquidated—the sum due him, as damages, from the defendants, was fixed—and the judgment constituted a debt within the meaning of the insolvency law. *In Re Comstock*, 22 Vt. 642. In this, it stood the same as a judgment based upon a contract would have stood, and any one of the defendants, with the others, was liable therefor. Without undertaking to determine what the law is, upon this question, when a claim for a joint conversion of property has been proved against the estate of one of the tort-feasors in insolvency, and a certificate of discharge granted him, we are satisfied that when a judgment has been obtained against the tort-feasors jointly for such conversion, that judgment may be proved against the estate of any one of them, and a certificate of discharge granted to the one against whose estate it is thus proved, without releasing the others therefrom. V. S. 2140.

The judgment was proved against the estate of Connor, and a dividend received thereon. The debt was thereby paid *pro*

tanto. The certificate granted Connor is his discharge from further liability, and such proceedings should be had in the case at bar as will permit him, by waiving his exceptions, to avail himself of that defense in this court if the circumstances will permit, otherwise, in the County Court upon such terms as may be fixed by this court.

The judgment not having been proved against the insolvent estate of either of the other defendants, the question arises whether it is a debt founded on a contract. If it is, upon receiving their certificates, each defendant was discharged therefrom because it was provable; but if it is not founded on a contract, neither of them is discharged therefrom because it was not proved against the estate of either. The debt is the judgment, and the judgment was recovered in an action of trover for the conversion of property, and therefore, it was founded on a tort, and not on a contract.

Although the technical rules regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendants to pay it, the primary nature and real foundation of the cause of action are not changed by procuring judgment thereon, and we may look behind the judgment in determining this question. *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265; *Huntington v. Attrill*, 146 U. S. 653; *Clark v. Rowling*, 3 Comst. 216, 53 Am. Dec. 290.

The judgment having been paid *pro tanto* by the dividend from Connor's estate, the plaintiff should enter a remittitur for the sum thus paid, and upon such entry being made, let the case be determined, as to defendants Smith and Kilgarlan, upon the exceptions; and as to defendant Connor, let the case stand for further consideration.

BLAISDELL AND BARRON, ADMINISTRATORS, v. GEO. H. DAVIS.

May Term, 1898.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed May 24, 1900.

*General issue with notice—Notice in the nature of a plea—Notice not a specification—V. S. 1149, 1150—*Notice of special matter of defence, filed with the general issue, is not a specification under the general issue, but is in the nature of additional pleading, and a defendant filing such notice may avail himself, under the general issue, of any evidence tending to show that a cause of action never existed.

*Departure in argument from position during trial—Discretion of the trial court—Deprivation of legal right must be shown—*That the defendant's counsel in his opening statement and during the introduction of evidence, in accordance with notice filed with the general issue, based the defence upon a certain contract, which, if proved, showed that the cause of action asserted by the plaintiff never existed, did not make it error to permit such counsel in argument to change his ground as to the date and form of the contract, but not as to its essence, the change being necessitated by the turn the evidence finally took, and there being nothing in the record to indicate that the plaintiff's preparation and management of the case were different from what they would have been had he known at the outset that the defence was to be placed on the ground finally taken.

*Evidence—Probability of disputed fact—*It being claimed that a material part of a letter introduced in evidence was not in the letter when sent, the testimony of a witness that he saw the letter within an hour after it was received, and that it then contained the part in question is admissible.

*Hand-writing—Qualification of witness to hand-writing—*A person who has become familiar with the hand-writing of another by reading his undisputed letters may give evidence tending to show the genuineness of a letter in question claimed to be written by him.

*Evidence in rebuttal—Order of evidence under rulings not excepted to—*When, under rulings of the court not excepted to, the order of evidence is established, the question of what is proper evidence in rebuttal will be determined with reference to the order so established in the particular case.

*Evidence of declarations—Circumstances and conversation giving force and certainty to declaration—*In showing a material declaration made by the

plaintiffs' decedent, the defendant was entitled to show enough of the circumstances in which it was made and the conversation of which it was a part to give force and certainty to the declaration.

Documentary evidence—Admissions as ground of receiving book—An account that is not an original book is proper evidence in connection with proof tending to show an admission of its correctness.

Admission—Scope of admission as to correctness of book—When the defendant's account book shows an application by way of payment of a claim which without such application the defendant could avail himself of only under a plea of offset, evidence tending to show an admission of the correctness of the account tends to show the propriety of such application.

Evidence as to the financial worth of one deceased—On the question of the amount and value of the property of a deceased person at a particular time in his life, the testimony of a witness who had been intimately associated with him in business for a period of many years, covering the time in question, as to his knowledge of the property of the deceased at such time, and his opinion of his financial worth based on such knowledge was competent.

Inventory as evidence against administrators—When the question of the financial worth of a deceased person is material in a case to which his administrators are a party, the inventory of his estate filed by such administrators shortly after his death is admissible in connection with evidence tending to show the amount of his indebtedness.

Presumption when record is silent—Such inventory having been received in evidence, it will be presumed that there was evidence in respect to the indebtedness of the deceased, if the contrary does not appear by the record.

Evidence—Character as to remoteness determined by other evidence—When the question is as to the financial worth of a deceased person five years before his death, evidence of the amount of his estate at the time of his decease is not too remote, when received in connection with evidence relating directly to his worth at the time in question.

Jones v. Ellis, 68 Vt. 544 distinguished.

Evidence of disconnected facts—Evidence that a father, in deeding a house to a daughter at a particular time, took back a life lease of it, has no tendency to show whether a transfer of property to the husband of the daughter about two years before was a gift, loan or payment.

Declarations—Natural import of conversation—Collateral facts—A deed by the decedent to a daughter, of a house, with a reservation of a life lease, might naturally be spoken of by him as a gift, and testimony as to the precise transaction would not properly rebut the testimony of a witness

who had recited a conversation in which the decedent spoke of the \$6000 in question as a gift and also of the collateral matter of the deed to his daughter as a gift.

Argument to the jury—In denying that he had stated during the trial that a trade in question was made while the defendant was living in the west, counsel for the defendant said in argument: "I knew otherwise; I knew that this trade was not concluded until after Davis [the defendant] returned to Vermont." This remark was not regarded as a statement by counsel of a material fact as within his own knowledge, but as an expression of his understanding as an attorney of what the case was to be, given as a reason why he could not have made the statement attributed to him.

Proper inferences of fact from non-production of book—Under a bare concession that the defendant had received from the plaintiffs' decedent a sum of money sued for, it behooved the plaintiffs if they had any evidence that their decedent expected the money to be repaid to produce it, and their failure to produce any book on which the money, conceded to have been delivered, was charged, was a circumstance tending to show that the delivery of the money did not create a debt and was proper for the consideration of the jury, and so for comment in the argument of counsel and the charge of the court.

Argument—The failure of the plaintiffs to produce a book on which the items making up their claim were charged being legitimate matter for comment, they could not have been harmed by an argument based on the less damaging fact that as administrators they had not included the claim sued on in their inventory, and hence the propriety of an argument based on the inventory is not considered.

Inferences as to letter not produced—The fact that counsel for the defendant in producing certain letters declared that they were all his client had received from the writer, did not make it error to permit the jury to find, from evidence subsequently introduced, that the defendant had received another letter from the writer, and on that fact, if found, in connection with the other evidence, to base such inferences as the testimony warranted.

Inferences of fact from language of letter as to writer's knowledge—The question of what facts may be inferred to have been within the knowledge of the writer of a letter, in view of the language of the letter taken in connection with all the other evidence, is for the jury. Such question is not one of construction.

Granite Company v. Mulliken, 66 Vt. 465 distinguished.

Argument to be confined to evidence—*Suggestion of facts not in evidence*—The defendant and his wife being disqualified from testifying, the de-

fendant's counsel in argument called the attention of the jury to this fact, and then went on to say that there were a great many things which his client knew and which his client's wife knew and which counsel knew that they could not show. This assertion was regarded as manifestly improper and as, without doubt, prejudicial.

Non-production of incompetent evidence—Making evidence—By passing to the other side, with an expression of consent to their use, inadmissible letters which the other side does not use, counsel do not acquire the right to comment in argument upon the failure of the other side to introduce the letters in evidence.

Argument—Reference to files in the case not connected with the trial—It is error for counsel, in argument to the jury, to state matters shown by affidavits, for continuance, filed in the cause but not pertaining to the trial, and not brought before the jury in connection therewith.

GENERAL ASSUMPSIT with specifications for money loaned and for rent. Pleas, the general issue with notice, and payment. Trial by jury, Orleans County, September Term, 1897, *Rowell*, J., presiding. The court directed a verdict for the plaintiffs for \$204.07, with interest thereon, the sum named being conceded by the defendant to be due and unpaid as rent, and submitted to the jury the right of the plaintiffs to recover in excess of that amount. Verdict for the plaintiffs to recover \$204.07 with interest. Judgment on verdict. The plaintiffs excepted.

The action was brought by B. M. R. Nelson in his life time, and after his death was prosecuted by W. H. Blaisdell and E. W. Barron as special administrators of his estate. The plaintiffs sought to recover as rent a larger sum than \$204.07, and also claimed to recover \$6000, on the ground that the decedent had loaned that amount to the defendant.

It appeared that the defendant's wife and Sam Nelson were the only children of the decedent.

The defendant called one Enoch Rowell as a witness who testified that in the summer of 1894 the decedent told him that he had given the defendant \$6000, and had given the defendant's wife what he called \$4000. He testified that these statements were made in the course of a conversation with reference to

trouble between the decedent and the wife of his son Sam and some part of the conversation, connected with the statement as to the gift to the defendant, but not directly concerning it, was testified to by the witness.

The defendant also called Sam Nelson as a witness and his testimony tended to show that the decedent had told him that he had given the defendant \$6000. As tending to show how the decedent came to say this, he was allowed to testify to other parts of the conversation which showed that the matter came up in connection with a contemplated gift to the witness of a like amount, and that the gift of \$6000, to the defendant, was referred to by the decedent as a reason for the contemplated gift to the witness.

The evidence consisted largely of letters, the number and nature of which are set out in the opinion. To the argument of the defendant's counsel as to the inferences proper to be drawn from the letter of December 18th, the plaintiff assigned his objections, which were only that it was not in line with the defence pleaded, that the plaintiff had had no notice of the claim made in argument and that there was no evidence supporting it.

To the instruction of the court in regard to the inferences which the jury might draw from that letter the plaintiff also assigned his objections, which were only that it was for the court and not for the jury to say what the letter indicated and that there was no evidence tending to show that any letter was written modifying the offer contained in the letter of December 12.

John Young and W. W. Miles for the plaintiffs.

F. W. Baldwin and Bates, May & Simonds for the defendant.

MUNSON, J. The plaintiffs, special administrators of the estate of B. M. R. Nelson, sought to recover six thousand dollars claimed to have been loaned defendant by the deceased. The exceptions state that the defendant admitted the receipt of the money as charged, and made no claim that he had repaid it, and

pleaded only the general issue with notice. This notice was in substance that on the first day of October, 1890, the defendant was the husband of Nelson's only daughter, and was living and engaged in business at West Superior, Wisconsin; and that Nelson, in consideration that the defendant would at once sell out his business and return to Barton, Vermont, to live, agreed to give him for so doing the sum of six thousand dollars; and that in accordance with such contract and agreement the defendant did at once thereafter sell out his business at a great sacrifice, and return to Barton to live; and that Nelson paid the defendant for selling out his business the sum of six thousand dollars, it being the same money mentioned in the first eight items of the plaintiffs' specifications.

In making an opening statement to the jury, defendant's counsel said he expected it would turn out in evidence that there was a great deal of correspondence between Nelson and the defendant with reference to the defendant's returning to Vermont, and that on account of the final agreement and contract that was made between them the defendant did return to Vermont and remain there. At the conclusion of this statement, defendant's counsel conceded the receipt of the six thousand dollars, and said, "we claim that Nelson paid it to Davis on this contract."

The plaintiffs also claimed to recover an item of rent, and the defendant conceded his liability for any balance of it remaining unpaid, and the plaintiffs thereupon rested their case. Defendant's counsel then said that there was unquestionably a *prima facie* case for the plaintiffs as far as the rent was concerned, but that they would like a ruling as to whether the plaintiffs had made out a *prima facie* case for the six thousand dollars, and the court then ruled that the defendant's concession as to the six thousand dollars made a *prima facie* case for the plaintiffs upon that part of their claim, and the defendant, without excepting to this ruling, proceeded with his evidence.

The exceptions state that the only evidence tending to show any contract or arrangement between Nelson and the defendant for the defendant's return to Barton, made before such return, was a correspondence covering nine letters from Nelson to the defendant or his wife, introduced by the defendant, and eleven letters from the defendant or his wife to Nelson, introduced by the plaintiffs. It may be gathered from these letters that the defendant and his wife had left Barton for a trip to the West not long before the commencement of the correspondence, and that there had been some talk before their departure about the defendant's going into business in Barton with financial assistance from Nelson; that Nelson did not anticipate that the defendant would establish himself elsewhere without further discussion of this plan, but that the defendant was disappointed at not receiving some definite statement from Nelson before leaving, and went with an inclination to locate in the West if circumstances were favorable; that before the matter was decided defendant's wife wrote Nelson with a view to ascertaining his intentions, and received a response which the defendant regarded as discouraging; that the defendant finally bought an interest in his brother's business at West Superior, without further communication with Nelson, and that Nelson was greatly disturbed when he learned what had been done.

The earlier correspondence relating to the trouble can be sufficiently characterized by a general statement. The letters of Nelson express throughout a great desire to have the defendant sell out and return as soon as possible, and a willingness to make good his loss in doing so and assist him after his return. The defendant at first urges the necessity of their remaining, but afterwards expresses a willingness to return if Nelson advises it after considering the matters submitted. It is evident, however, that this was followed by the making and withdrawal of further objections in letters not produced; for Nelson afterwards speaks of his disappointment in finding that what he had written was

deemed insufficient, and later, of his pleasure at the prospect of their speedy return.

In the letter last referred to, Nelson remarked that he did not want the defendant to do anything to injure himself financially, and asked defendant to write him what he should expect him to do for him when he got back. In reply to this the defendant wrote that he should at least expect him to fix up the store as had been talked, and let him have it rent free, and furnish him not to exceed eight thousand dollars without interest, to be paid back as fast as it could be without injury to the business; Nelson to have what goods he took at cost and freight. To this Nelson replied, under date of December twelfth, that if the defendant would come back he would fix up the store to suit him, and let him have the use of the store and eight thousand dollars in money without rent or interest until the rent and interest should amount to one thousand dollars, and pay the regular price for what he had from the store; and the letter contains the further statement that if this was not satisfactory he would give defendant six thousand dollars and let him have it along as needed. Defendant's letter of December eighteenth, written partly by himself and partly by his wife, does not acknowledge the receipt of the above communication, but would seem from its contents to have been written in reply to it. In this letter the defendant speaks of the difference between his wife's having money and his having it in his own right, and further on says he can see Nelson's offer in no other light than that he will give him the equivalent of one thousand dollars and put him under a debt drawing interest after eighteen months; and his wife says it is only giving him one thousand dollars, and that if they stayed there they would not need to borrow money and pay interest.

In offering the letter of December twelfth, defendant's counsel spoke of it as "conclusive of the case." The plaintiffs objected to its admission on the ground that the alternative proposition to give the defendant six thousand dollars was not

written therein by Nelson. No letter written by Nelson later than December twelfth was produced, but a letter from the defendant's wife speaks of one dated the 27th. The exceptions show that the plaintiffs notified the defendant to produce all letters received by the defendant or his wife from Nelson after December 12, 1890, and that defendant's counsel replied, "These letters, exhibits one to eleven, are all the letters that the defendant or his wife received from Mr. Nelson after that date that we can find or know anything about, or ever knew anything about." The plaintiffs introduced a letter, dated January 4th, 1891, in which the defendant wrote Nelson that after discussing the matter further they had come to a final decision that they could never understand things or make them understood by writing, and that they were going to Vermont about the 27th, with the intention of staying if satisfactory arrangements could be made.

Defendant's counsel suggested in argument, in explanation of defendant's letter of December eighteenth, that the offer of six thousand dollars contained in the letter of December twelfth might have been modified by a subsequent letter from Nelson stating it to be an advancement to the wife, or that the offer as made might have been understood by the defendant and his wife to have been so intended. But, upon being inquired of by the court, counsel stated that they did not stand upon the ground of an advancement to the defendant's wife, and did not claim that when defendant returned to Vermont there was any agreement between him and Nelson as to what Nelson should give him for coming back, but did claim that it fairly appeared from the circumstances of the case, in connection with the testimony as to Nelson's statements, that an arrangement was made after the defendant's return, by which Nelson let defendant have six thousand dollars in such a way that it did not create a debt from him to Nelson. The charge of the court permitted a verdict for the defendant upon the ground stated.

It is clear that the notice filed with the general issue, and the opening statement made by counsel, placed the defendant's claim upon an agreement made before the defendant left West Superior, and operating as the consideration for his return; and the position taken by counsel during the introduction of evidence, as before indicated, was in harmony with that theory; and the exceptions disclose nothing previous to the argument that would notify plaintiff's counsel of any other claim. It is evident that the production of defendant's letter of January fourth forced the defence to change its ground as to the date and form of the contract. The defendant was not precluded from doing this by the notice filed, for a notice is treated as a pleading and not as a specification. Any evidence tending to show that there was never a cause of action could be made available under the general issue. *Gregory v. Tomlinson*, 68 Vt. 410; *Limerick Bank v. Adams*, 70 Vt. 132. Nor were defendant's counsel precluded from this course by their previous treatment of the case. It cannot be said that the plaintiffs were necessarily harmed by the change. The essence of the claim as originally stated remained the same. It is true that a contract spoken of as the consideration of defendant's return became by this change a contract made after his return and the consideration for his remaining; but this was immaterial, for the return was nothing except as it involved a remaining. The change was important only in its relation to the matter of evidence. The conduct of the trial in this respect was within the discretion of the court, and there can be no advantage of exception unless it is made to appear that the course taken deprived the plaintiffs of some legal right. If the plaintiffs' preparation and trial of the case were such as fully met the position finally taken, they had no ground of complaint. There is nothing in the case from which we can say that they were harmed in this respect. It does not even appear that they claimed in the court below that their preparation or management of the case would have been different if they had known the defence was to be placed on the ground finally taken.

The claim of plaintiffs that there was no evidence tending to show that any contract was made after the defendant returned to Barton cannot be sustained. The correspondence indicated that the defendant returned in consequence of certain negotiations, to remain if satisfactory arrangements could be concluded. He did remain, and there was evidence of statements by Nelson that he had given him six thousand dollars.

The plaintiffs claimed that the six thousand dollars alternative offer was not in the letter of December twelfth when sent, and their claim was supported by the fact that no mention was made of that offer in defendant's letter of December eighteenth. To meet the unfavorable inference arising from this fact, it was permissible to show by one who saw the letter within an hour after it was received, that it then contained the clause in question.

Nor was it error to elicit from this witness that he had been shown the previous correspondence and had read enough of it to become familiar with the handwriting of the letter in question, and that about that time he read a letter in that handwriting in which the writer promised to pay the defendant six thousand dollars if he would come back. The answer in this form was doubtless some evidence tending to show that the disputed clause was in Nelson's handwriting, and as such it was afterwards made the basis of an objection to evidence offered to rebut the plaintiffs' case upon that point. But this evidence was not introduced under any holding that the defendant must offer proof of the handwriting of that clause to entitle the letter to admission, and we do not think its introduction entitled the plaintiffs to have the defendant's evidence of genuineness put in at that time. The defendant offered the letter in putting in his case, and the plaintiffs stated their claim by way of objection, but upon being told that the right to contest the genuineness of that clause would be open to them, the letter came in without objection. The plaintiffs did contest its genuineness in putting in their reply to the

defendant's case, and the defendant was then permitted to rebut by introducing expert evidence that the clause was in Nelson's handwriting. The order of evidence under the rulings of the court, not excepted to, was such as clearly made this evidence proper in rebuttal.

The exceptions taken to the testimony of Rowell and Sam Nelson as to the fact of trouble between Nelson and Sam's wife, and what Nelson said about it, are not sustained. The defendant was clearly entitled to show enough of the circumstances and conversation to give force and certainty to Nelson's declaration. None of the testimony that came in under exception exceeded this limit.

One Hartwell, a clerk in the defendant's store, testified that the defendant kept an account with Nelson, and that at a time when this account showed certain items of rent credited Nelson on the goods he had had, with a balance struck showing a small amount his due, Nelson looked the account over and said it was probably all right. The account was thereupon received in evidence in connection with the testimony of the witness, as tending to show part payment of the rent sued for. This was not error. The admissibility of the book did not depend upon its being a book of original entries, but upon Nelson's recognition of it as a correct account. The book was relied upon only as the basis of an admission. Nor was it made inadmissible by the fact that there was no plea in offset. The evidence had a tendency to show that Nelson recognized the application of the rent in payment of his store account as proper, and treated the balance shown as the amount his due.

The court held that if Nelson could well afford to do what it was claimed he did do, it would be some evidence tending to show that he did it, and received evidence that he was worth about fifty thousand dollars. The plaintiffs excepted to the evidence as irrelevant, and now insist that no presumption that a man has agreed to pay money can arise from the fact that he has ample means to make the payment. The argument hardly reaches

the ground of admissibility. Many facts that have no independent tendency to establish an issue become admissible after other evidence has been adduced. This fact was offered as bearing upon the probability of a very unusual agreement as to the making of which direct evidence had been introduced. The essence of the defendant's claim was that Nelson had given six thousand dollars for the pleasure of having his daughter live near him. We think the possession of ample means would have a legitimate bearing upon the question whether such a contract had been made.

The evidence offered in proof of this fact was also objected to on the ground that it was incompetent. The witness had been associated with Nelson in business for many years, and he was permitted to state what he knew of Nelson's property, and give an opinion of his worth based upon that knowledge. We think evidence of this character is admissible. It is, like most evidence, subject to the infirmity of uncertainty, but it would evidently be impracticable in the case of unsettled estates to prove the fact in any other way.

The defendant was also permitted to introduce, as tending to show what Nelson was worth at the time in question, the inventory of his estate filed in the Probate Court by the plaintiffs as special administrators. It is argued that this was incompetent without evidence tending to show the amount of the indebtedness. For aught that appears in the exceptions there may have been such evidence. It is also claimed on the authority of *Jones v. Ellis*, 68 Vt. 544, that the evidence was too remote in point of time. But the testimony of the witness last referred to evidently furnished the connection that was considered necessary in the case cited.

The plaintiffs offered to show that Nelson, on deeding a house to his daughter in November, 1892, took back a life lease of it,—as tending to show that Nelson was not giving away his estate, and to rebut Rowell's testimony that Nelson told him he had given the house to his daughter. This was properly excluded.

It is difficult to imagine how this transaction, two years after the one in question, could have any bearing upon the probability of the defendant's claim. Nor did it fairly tend to rebut Rowell's testimony. The testimony was not a statement of the fact itself, but of what Nelson said about it; and the transaction was one which Nelson might naturally and properly speak of as a gift.

Several points are made under exceptions taken to the argument. In denying that he had stated, early in the trial, that there was an offer of six thousand dollars which was accepted, and on the strength of which the defendant had returned to Vermont, Mr. Prouty remarked, "I never said it, * * * I knew otherwise. I knew that this trade was not concluded until after Davis returned to Vermont." Plaintiffs' counsel treat what follows the denial as a statement by counsel of a material fact as within his own knowledge. We do not so regard it. It was apparently urged as a reason why he could not have made the statement claimed, and we think it may properly be treated as a reference to his understanding as an attorney of what their case was to be.

But, in another part of his argument, after referring to the fact that the law closed the mouth of the defendant and of his wife, Mr. Prouty went on to say that there were a great many things about the case which the defendant knew, and which his wife knew, and which counsel knew, which they could not show. This positive assertion of the existence of facts which could not be shown because of the disqualification was manifestly improper and doubtless prejudicial.

Nor was the advocate justified in referring to and commenting on the fact that the plaintiffs had not offered three inadmissible letters written by Mrs. Nelson, which defendant's counsel had passed to the other side with an expression of their desire to have them in the case. The failure of a party to produce competent evidence in his possession is proper matter of comment, but a party cannot make evidence for himself by placing inadmissible documents in the possession of the other party with

a waiver of objection, and commenting on his failure to use them.

Any conduct of a party and his counsel in the trial of a cause which has a legitimate bearing upon the good faith of his claim, so far as it has appeared before the jury, is proper matter of comment. But matters shown by the files, not pertaining to that trial and not brought before the jury in connection with it, cannot be made use of in argument. It was error for counsel to state to the jury what had appeared in affidavits for a continuance at a previous term.

Mr. Prouty argued the non-existence of any written evidence of indebtedness from the fact that the claim was not included in the inventory returned by the special administrators. It is not necessary to inquire just what could properly be inferred from this fact. The conduct of the trial on the part of the plaintiffs afforded so much better ground for the argument that the plaintiffs cannot have been harmed by its being first put on the ground stated.

No book was produced on which Nelson had made any charge of the items making up the six thousand dollars. The court in its charge recognized the validity of the argument made by defendant's counsel that the absence of any charge of these items was a circumstance tending to show that the payment did not create a debt; and to this the plaintiffs excepted. The plaintiffs claimed and now contend that the defendant's concession that he received the six thousand dollars as charged in the specifications relieved the plaintiffs from producing any written evidence upon that branch of the case, so that the omission to produce a book had no tendency to show that charges were not made. But the concession touched only the delivery of the money, and the question was whether it was to be repaid, and if the plaintiffs had any evidence which tended to show that Nelson so expected, it behooved them to produce it, and their failure to do so was a proper matter for the consideration of the jury.

The court instructed the jury that if the defendant's letter of December 18th fairly indicated to their minds that it was

probable that Nelson had written a letter subsequent to his letter of December 12th modifying the offer therein submitted, they would have a right to act upon what was so indicated. The plaintiffs claim that this was error because defendant's counsel, upon being previously notified to produce all letters of Mr. Nelson written after December 12th, replied that they had produced all they could find, or knew anything about, or had ever known anything about. It is obvious that this emphatic denial had no effect upon the conduct of the plaintiffs' case, and it was not error to proceed upon the assumption that there might have been such a letter notwithstanding the statement. In fact, the answering correspondence refers to one of later date that was not produced.

Counsel also claim that it was for the court to construe the letter and say what it fairly indicated, and cite us to the rule deduced from *Granite Company v. Mulliken*, 66 Vt. 465, that when the terms of a letter are unambiguous, and require no resort to extrinsic evidence to aid in their construction, the court should construe them. But the cases are not the same. That was a letter conferring authority to make a contract, and the court held that its terms were not ambiguous. Here, it was not claimed that the letters introduced constituted a contract. The question was not one of construction, but of inference. The matters which were within the knowledge of the writer at the time of writing were to be inferred from a consideration of the indefinite terms of his letter in connection with what had been previously written, and the inference drawn was to be considered in connection with the other evidence in determining the main question.

Judgment reversed and cause remanded.

GEORGE P. BLAIR, Assignee, v. RITCHIE and WARDEN.

October Term, 1899.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON, and WATSON, JJ.

Opinion filed May 24, 1900.

Certificate of town clerk endorsed on deed not conclusive.—The certificate of a town clerk upon a deed or mortgage is but *prima facie* evidence of the time when it was left for record, and may be contradicted by parol evidence.

Instructions to file but not record—A deed or mortgage left with a town clerk with instructions to place it on file but not to record it, is not left for record and the filing of it as for record is without effect. The clerk should refuse to receive a deed or mortgage offered with such instructions and should put no certificate thereon.

Recording in disregard of instructions—If a deed or mortgage, left with a town clerk with instructions to file it but not to record it, is subsequently recorded without further instructions, the record is unauthorized and void.

Ratification of act of recording by taking instrument and paying record fee—Limitation upon retroactive effect of ratification—Such ratification of the act of a town clerk in recording an instrument contrary to instructions as may arise from calling for the instrument and paying the record fee can not relate back so as to affect property rights acquired before such ratification.

Ratification at about the time to which assignment in insolvency relates—Proof of priority—When such ratification of the previously unauthorized recording of a mortgage was at about the time of the filing by the mortgagor of a petition in insolvency, it devolves upon one relying on the record of the mortgage so ratified as against the assignee in insolvency to establish the fact that the ratification was before the filing of the petition.

Unrecorded mortgage without possession invalid against assignee—A mortgage of personal property not taken into the possession of the mortgagee is invalid against the assignee in insolvency of the estate of the mortgagor, if there is no authorized record of the mortgage at the time of the filing of the petition in insolvency.

When assistant town clerk may act as clerk—V. S. 3014.—The delivery of a mortgage to an assistant town clerk, when the town clerk is present in the town clerk's office and is under no temporary disability, is not delivery to the town clerk.

Agency of assistant clerk in delivering instruments to clerk—The delivery of a mortgage to an assistant town clerk when the clerk is present and acting in the town clerk's office makes the assistant an agent in respect to the delivery to the clerk.

Evidence of instructions conveyed through agent—Res gestae—Agent may testify that he followed instructions of principal—A mortgagee drove up in front of a town clerk's office, and, outside the office, handed a mortgage to the assistant clerk, who immediately took it inside the office and handed it to the clerk with instructions, which the clerk remembered and testified to, to put it on file but not to record it. The assistant was not able to remember the exact language of the instructions received by him from the mortgagee, but testified that he told the clerk what the mortgagee told him. This testimony taken together was admissible under the doctrine of *res gestae* and the rule that an agent may testify that he acted in accordance with the instructions of his principal.

CHANCERY. The cause came on for hearing on pleadings, master's report and exceptions thereto, Caledonia County, June Term, 1899, *Thompson*, Chancellor. Decree *pro forma* overruling the exceptions and dismissing the bill. The orator appealed.

The bill was in substance, a bill to set aside a mortgage of personal property given to the defendants Ritchie and Warden on the ground of its invalidity as against the orator, who was the assignee in insolvency of the estate of the mortgagor, one James W. Blaine.

Bates, May & Simonds for the orator.

Dunnnett & Slack for the defendants.

WATSON, J. The law is well settled in this State that the certificate of a town clerk upon a mortgage or deed of the time it was received for record, is but *prima facie* evidence of the true date, and that parol evidence is admissible to vary or contradict the same. *Bartlett et ux. v. Boyd*, 34 Vt. 256; *Johnson v. Burden et al.*, 40 Vt. 567.

The mortgage in question was executed and delivered to the defendants on April 27, 1897, and by them held until June 7, 1897, when defendant Ritchie took it and drove to Barnet village, in front of the store of Burbank & Robie who were partners in

trade. The town clerk's office was in this store, and Burbank was the town clerk. Robie was the assistant town clerk. Ritchie delivered the mortgage to Robie outside of the store, and Robie immediately carried it into the store and there, in the town clerk's office, delivered the same to Burbank, the town clerk, who at once filled in and signed the certificate on the back of the mortgage, to show when he thus received it, but leaving the places for the volume and the pages thereof, when recorded, blank, and the mortgage was then placed among the unrecorded papers in the town clerk's office.

The assistant clerk has the same power to certify to records and copies as the clerk, but, other than that, he can act only in the absence or temporary disability of the town clerk. V. S. 3014.

At the time this mortgage was delivered to Robie, the town clerk was neither absent nor under any temporary disability, but was in the town clerk's office, hence the delivery of the mortgage to Robie was in no sense a delivery to the town clerk. When Ritchie delivered the mortgage to Robie, the latter was made the defendants' agent to carry it into the town clerk's office, and the instruction then given Robie by Ritchie relative thereto, and that Robie, in delivering the mortgage to Burbank, town clerk, gave the same instructions, were properly shown in evidence, as a part of the *res gestae*. 1 Green. Ev. sec. 113.

But it is said by the defendants' solicitors that the mode of proof was not in accordance with the law of evidence. The case shows that Burbank testified that when Robie gave him the mortgage, Robie said to put it on file, but not to record it; and that Robie, although unable to give the exact language used by Ritchie to him, gave evidence that he immediately took the mortgage to Burbank and gave him the instructions as he, Robie, had received them from Ritchie.

What is in fact said by an agent, constituting a part of the *res gestae*, may be proved by the agent or by any one else who heard it. 1 Green. Ev. sec. 113. And the agent may testify

that he acted according to the directions of his principal. 1 Green. Ev. sec. 417. In this case, the agent at the time of performing his duties as such, knew his instructions, and knew whether he gave the same instructions to Burbank, and he was properly allowed to testify that he did so do. It was but stating, in effect, that he acted as directed by his principal.

With this evidence before the master, the fact is found that when Burbank received the mortgage he was instructed by the defendants, through their agent, to put the mortgage on file but not to record it. The mortgage was kept among other papers on file in the office for record, open to the public, and where the same could be shown to any person inquiring for the files or in regard to incumbrances upon Blaine's property, until the fore part of December, 1897, when it was recorded in the book of mortgages of personal property by the town clerk. If the mortgage was recorded at that time by the defendants' directions, the record would be effective as against the orator; it therefore became material to inquire by whose direction, or by what authority, the record was thus made, and it was not error for the master to receive evidence thereon.

The case shows that no evidence was introduced that the town clerk received any instructions in regard to recording the mortgage after it was delivered to him, and the master finds that the reason why the town clerk did not earlier place the mortgage on record was because of the instructions received at the time of the delivery of the same to him by Robie, and that he placed it on record the fore part of December because Morris Miller, one of Blaine's creditors, wanted a copy thereof.

While it is true that if such an instrument is left in the town clerk's office for record and it is filed by the clerk and remains in the office, it is as effective for all purposes of notice as spreading it upon the record book, and is a compliance with the statute, and the subsequent recording has relation back to the time of filing,—*Fairbanks, Brown & Co. v. Davis & Wright*, 50 Vt. 251,—when such instrument is left with the town clerk with

directions that it be filed but not recorded, it is not filed for record, and the town clerk has no right to place it upon record until he has received further instructions, and to that effect; and if he subsequently places it upon record without such further instructions, the record thereof is without authority and void. *Low v. Pettengill*, 12 N. H. 337; *Town v. Griffith*, 17 N. H. 165.

The duties of a town clerk do not require him to receive such an instrument, unless it is delivered to him for record; and if offered to him with instructions not to record the same, he should refuse to receive it, and should place no certificate thereon.

Nor can the fact that defendant Warden called for and took the mortgage from the town clerk's office, paying the recording fee thereon, about the time Blaine was adjudged insolvent, be construed as a ratification, by the defendants, of the act of the town clerk in recording it, that will avail them in this action. The filing of the petition and the adjudication thereon, were on the same day, and, upon the facts found, the paying of the recording fee, and the taking of the mortgage from the town clerk's office may have been before the filing of the petition, or not until afterwards. If the defendants relied upon such ratification, it devolved upon them to establish it at a time prior to the filing of the petition, which they failed to do. *Reese v. Medlock*, 27 Texas 120, 84 Am. Dec. 611.

By operation of law, the assignment to the orator of the insolvent estate under the insolvency law, related back to the time of filing the petition,—V. S. 2099; *Goss v. Cardell*, 53 Vt. 447,—and the assignment vested in the orator all the property of the debtor that might have been taken on execution upon a judgment against him at that time. V. S. 2098; *Tilden v. Crimmins*, 60 Vt. 546.

The maxim that a subsequent ratification has a retrospective effect, and is equivalent to a prior command, is not unlimited in its application; and the subsequent ratification (if such it may be termed) by the defendants of the acts of the town clerk in recording the mortgage, cannot relate back so as to divest the ora-

tor of his property rights previously acquired under the assignment. *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

It is not claimed that the defendants ever took possession of the property, and as the mortgage was not recorded prior to the time of the filing of the petition in insolvency against the mortgagor, it was at that time invalid against any person except the mortgagor, his executors and administrators, and the property covered thereby might then have been taken on execution upon a judgment against him, and therefore it passed to the orator as assignee. V. S. 2252.

Pro forma decree reversed, and cause remanded with mandate that the mortgage in question is invalid against the orator, assignee of the estate of the mortgagor in insolvency; and that the property covered by the mortgage passed to the orator under the assignment to him by the Court of Insolvency of the estate of the mortgagor. Let the orator recover his costs.

IN RE WILLIAM F. GOULD'S WILL.

January Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed May 31, 1900.

Revival of will upon destruction of revoking will—A former will may revive upon the destruction of a later will which operates as a revocation of the former.

Republication not necessary to revival—A republication is not necessary to the revival of a former will.

Revival depends upon intention accompanying destruction of later will—No presumption from mere destruction of later will—Whether or not a former will revives upon the destruction of a later will which operates as a revocation of the former, depends upon the intention of the testator in the destruction of the later will. No presumption of revival arises from the fact, standing alone, of the destruction of the later will.

Intention of testator as to revival of former will—Recognition of its existence—Solicitude for its preservation—Satisfaction with its provisions—Purpose to die testate—In the presence of the custodian of a former will, duly executed, a testator burned a later will, also duly executed, by which the former was revoked, and at the same time charged the custodian of the former will to keep it, declaring in effect that he wanted his property to go in accordance with its provisions. These facts, in connection with due proof of testamentary capacity at the requisite times, entitled the former will to probate.

Warner v. Warner's Estate, 37 Vt. 350, distinguished.

APPEAL by the proponent, Benjamin F. Gould, from a decree of the Probate Court refusing the allowance of a certain written instrument as the last will and testament of William F. Gould, deceased. Trial by jury, Windham County, September Term, 1899, *Munson*, J., presiding. Verdict was directed, strictly *pro forma*, for the contestants. Judgment on verdict. The proponent excepted.

The contestants relied upon the revocation of the will offered for probate, by a subsequent will which made a disposition of the testator's property different from that made by the will offered. They showed the destruction by the testator of the second will, and claimed that the said William F. Gould died intestate.

Haskins & Schwenk for the proponent.

Waterman & Martin and *Clarke C. Fitts* for the contestants.

TYLER, J. It was the settled rule in England prior to the statute, 1 Vict. ch. 26, enacted in 1837, that where the testator kept his first will undestroyed and uncanceled, made a second will by which he virtually or expressly revoked the first, and then destroyed or cancelled the second, thus repealing his revocation, the first will thereupon revived and continued in force. The ecclesiastical courts, however, held that the presumption was against the revival of the prior will, and placed the overcoming the presumption upon the proponents of the will. This doctrine

was afterwards modified, and the question was made one of intention to be drawn from all the facts and circumstances in each case. The English statute referred to provided that no will or codicil which had been revoked should be revived otherwise than by republication, or by a codicil executed as required by the act, and showing an intention to revive the same. 1 Woerner's Law of Admin. sec 52; 1 Williams on Ex'ors, 226; Schouler on Wills, sec. 413; 1 Red. on Wills, 308-9; 29 Am. and Eng. Ency. 288; *Harwood v. Goodright*, 1 Cowp. 91; *Goodright v. Glazier*, 4 Burr. 2512.

There is a diversity in the decisions of the American courts upon this subject, which is partly due to statutory requirements. *Rudisell v. Rodes*, 29 Gratt. 47, was decided under a statute that required a revival of a revoked will to be made by a republication or by a codicil. In some jurisdictions the rule is, without a statutory requirement, that a revocation of a subsequent will does not *ipso facto* revive a former one expressly or impliedly revoked by the latter. *Bohanon v. Walcot*, 1 How. (Miss.) 336; *Harwell v. Lively*, 30 Ga. 315. Some courts have held that where there is an express revocation in the subsequent will the prior one cannot be revived without a republication. *Howes v. Nicholas*, 72 Tex. 481; *Scott v. Fink*, 45 Mich. 241; *Stewart v. Mulholland*, 88 Ky. 38. Other courts have held that where one will is revoked by another, the revocation is testamentary, and the revocation of the latter revives the former. *Randall v. Beatty*, 31 N. J. Eq. 643. The Maryland court lays down a rule practically in accordance with the later ecclesiastical rule that we have referred to that the cancellation of a revoking will is *prima facie* evidence of the testator's intention to revive the previous will, but that the presumption of that intention, from the mere act of cancellation, may be strengthened, qualified or rebutted altogether by the attending circumstances and probable motives of the testator. *Colvin v. Warford*, 20 Md. 391. In the application of this rule to a case in hand, it was held in *McClure v. McClure*, 86 Tenn. 173, that where a testator had

two inconsistent wills and destroyed the second with the expressed purpose of making a third, the first was not thereby revived, though found among his valuable papers, for the motive for destroying the second will being explained, no presumption could arise in favor of the first.

The weight of authority in this country is clearly in support of the rule that a republication is not necessary to revive a will that has been revoked by a subsequent one that has itself been revoked, even though the subsequent will revokes the prior one in express terms; that the prior will is not annulled by such revocation, for the reason that such revocation does not take effect until the will itself which contains the revocation becomes operative by the death of the testator; that until that event the revocation is ambulatory; that by the second will the testator merely declares his intention to revoke the first; that he may change his intention at any time; that if, after his death, it appears that the revoking will has itself been destroyed, then the intention to revoke never goes into effect. The authorities differ upon the questions whether the prior will is revived by the mere act of destroying the revoking will, whether that act raises a presumption in favor of the validity of the prior will, making a *prima facie* case for its proponents without affirmative evidence of the testator's intention; or whether the question as to his intention, upon his destruction of the revoking will, to die intestate, or to have his estate distributed under the provisions of the first will, is to be determined by all the facts and circumstances in the case.

It is the rule in Michigan that where a subsequent will contains an express revocatory clause, the prior will is thereby revoked; whereas, if the second will is only inconsistent with the first, but not expressly revocatory, its destruction by the testator will revive the first. *Cheever v. North*, 106 Mich. 390, 37 L. R. A. 561.

In *Randall v. Beatty*, *supra*, the testatrix executed several wills all of which she destroyed except one executed in 1870. By

a will made in 1873, she expressly revoked all former wills, and delivered to a legatee a paper which she represented to be the will of 1870, with directions to destroy it, which paper was destroyed. She afterwards cancelled the will of 1873. After her death the will of 1870 was found carefully preserved among her effects; *held*, that the cancellation of the will of 1873 revived that of 1870, and that her directions to have that will destroyed did not affect it.

Peck's Appeal, 50 Conn. 562, was decided upon the grounds that the revoking clause in the second will was inoperative until the testator's death, and that the revocation was ambulatory until that event. The same idea is expressed in *Sewall v. Robbins*, 139 Mass. 164, where it was held that an objection to the admission of a will to probate, that it had been revoked by a later will, could not be sustained until the subsequent will had been put in evidence, and that it could not be put in evidence until it had been admitted to probate.

The cases, *Lawson v. Morrison*, 2 Dall. 286, and *Flintham v. Bradford*, 10 Pa. 82, held to the extreme doctrine, that the destruction of a will which repealed a previous one, leaves the first as if the second had never existed, unless it is clearly shown that the testator destroyed the second will with a view to die intestate, and that it was immaterial whether the later will contained a revoking clause or not. These decisions were put upon the ground that neither will had any effect in the life of the testator.

The most reasonable rule that can be formulated makes the question of revival depend upon the intention of the testator at the time of the destruction of the revoking will. A presumption does not arise from that act alone that it was his intention to reinstate the former will. The fact that he once superseded that will by another on account of changed conditions of his estate or changed circumstances of persons who were dependent upon him tends to repel such a presumption. But the destruction of the superseding will, the safe keeping of the former one, the testa-

tor's acts and declarations respecting it, and his declared purpose not to die intestate, are facts competent to be shown in establishing a prior will, if, in the circumstances of the case, it is proper to show and it appears that a subsequent will had in fact been executed. It was in the application of this rule to the facts of a case that *Pickens v. Davis*, 134 Mass., was decided. See also, *Williams v. Williams*, 142 Mass. 515. Schouler on Wills, sec. 415, treats the question of revival as one of intent to be gathered from all the circumstances. Woerner, sec. 51 and notes, seems to regard this as the American doctrine. In 1 Red. on Wills, 308-9, it is laid down as the rule in this country that where a second will is destroyed with intent to revive an earlier one, it should, without question, be allowed so to operate. Judge Redfield extends the rule further and makes it to accord with the Pennsylvania cases above referred to.

Warner v. Warner's Estate, 37 Vt. 356, is not opposed to this rule. In that case it was only held that the words, "This will is hereby cancelled and annulled in full this 15th day of March, 1859," written by the testator beneath the attestation clause, amounted to a revocation of the will by "cancelling" and could not be revived by the testator's parol declarations subsequently made. When the will was offered for probate it was disallowed upon the ground that it had been revoked by the testator by cancelling in compliance with the statute. *The Noyes Will*, 61 Vt. 14, obviously is not a case in point. In that case the contestants produced a witness who testified that he had seen a later will than the one offered for probate, apparently signed and witnessed in due form, containing a revoking clause, and that the testator told the witness why he made it. The later will was not found nor was there an offer to produce the witnesses, nor to explain their non-production; *held*, that such later will must be established by the same evidence as would be required if it were itself presented for probate.

The evidence introduced in this case tended to show that the testator executed the will in controversy Aug. 31, 1880, and that after the death of his wife in 1882, he handed the will to his son, the proponent, and requested him to keep it, and that the proponent did keep it in a safe in Hartford, Conn., where he resided; that in the winter of 1893-4 the proponent was at the testator's house in Townshend, Vt., when the testator inquired of him about the will and spoke of adding a codicil to it, for the purpose of providing a home for his sister, who was his housekeeper, but the will being in Hartford, a codicil was not added; that his sister died in 1898, and that soon after her death the proponent, at the testator's request, went home to live and kept house for him until his death in 1899; that soon after the proponent's return to the testator's house the latter handed him a second will to read which he had made in May, 1896, and which the testator then destroyed by burning in the proponent's presence; that the testator then said to the proponent in substance: "You do not want to say anything about our business here, or that will you have got, and do not let any one get it away from you. I want it to go exactly as it says."

The proponent presented the will of 1880 for allowance and proved its execution and the testator's testamentary capacity. The contestants were permitted to prove the execution of the second will and its provision and its destruction.

Upon the foregoing facts the will of 1880 should have been admitted to probate.

The pro forma judgment is reversed, verdict set aside and cause remanded.

SILAS O. MEAD v. TOWN OF MORETOWN.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and
WATSON, JJ.

Opinion filed June 19, 1900.

Time for filing exceptions under V. S. 1628—Exceptions cannot be entertained by the Supreme Court unless they are filed with the clerk of the County Court within thirty days from the rising of that court.

Same—Case left "with the court"—Case standing on report before No. 35, Acts of 1898, took effect—Leaving a case with the court by agreement cannot extend the term of court for the purpose of filing exceptions.

Hall v. Simpson, 63 Vt. 601 distinguished.

PETITION in the nature of an appeal from the decision of the selectmen of Moretown establishing and opening a highway. The case came on for hearing on the report of commissioners, Washington County, September term, 1898, *Start*, J., presiding, and at the final adjournment of court December 3, 1898, was left "with the court." The court met December 28, for the disposition of cases so left, *Ross*, C. J. presiding, and at that time accepted the commissioners' report, made orders for establishing and opening the highway in question and rendered judgment for the petitioner to recover damages in accordance with the report. The petitioner excepted. The bill of exceptions was filed with the clerk of the County Court January 27, 1899.

T. R. Gordon for the petitioner.

E. A. Heath, *T. J. Deavitt* and *E. H. Deavitt* for the petitioner.

TAFT, C. J. The exceptions in this case were taken in the County Court for the County of Washington at its September Term, 1898. The court took its final adjournment on 3d December of that year. The court met for the disposition of cases which had been left "with the court" on the 28th day of

December and the bill of exceptions in this case was filed 27th January, 1899, more than fifty days after final adjournment. In causes pending in the County Court, exceptions must be filed with the clerk within thirty days from the rising of the court. V. S. sec. 1626. And if they are not so filed they cannot be entertained in the Supreme Court. *Higbee v. Sutton*, 14 Vt. 555; *Shattuck v. Oakes*, ib. 556; *Small v. Haskins*, 29 Vt. 187; *Nixon v. Phelps*, ib. 198. No agreement of the parties that exceptions may be filed after thirty days from the time of final adjournment can give jurisdiction to this court.

This case is not in conflict with *Hall v. Simpson*, 63 Vt. 601. It does not appear in that case whether the exceptions were filed within or after the expiration of thirty days from the time of final adjournment. The written statement of facts was amended more than thirty days after the rising of the court and the only question in that case was as to the power of amending the statement after the exceptions were filed. The court held that that could not be done. The effect of that case may be to hold that the parties cannot object to the validity of a judgment entered after the term of court has adjourned when the case has been left with the court for judgment, by agreement of parties. But in respect to exceptions, no agreement of the parties can extend the term of court for the purpose of filing them. A majority of the court hold they must be filed within thirty days from the time of final adjournment or the court cannot entertain them.

Exceptions dismissed.

BENJAMIN A. BYLOW v. UNION CASUALTY & SURETY COMPANY.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and
WATSON, JJ.

Opinion filed June 19, 1900.

Accident insurance policy—"Wholly and continuously disabled"—Identity of occupation—To oversee is to superintend—One cannot be said to be wholly and continuously disabled from performing any and every duty pertaining to his occupation, within the meaning of an accident insurance policy, when one of his duties is "overseeing," and he continues in the same employment "superintending" the kind of work he had previously been engaged in, working nine-tenths of full time and receiving ninety per cent of full pay.

ASSUMPSIT on an accident insurance policy. Pleas, the general issue and three special pleas. City Court of Barre, February 26, 1900. Trial by court, *Boyce*, J. Judgment for the plaintiff. The defendant excepted.

Geo. A. Brigham and *William Wishart* for the plaintiff.

Edward H. Deavitt for the defendant.

TAFT, C. J. This case is brought to this court by exceptions from the City Court of Barre. The plaintiff was insured by the defendant company against accident and in order to entitle him to recover, one condition of the policy was, that the accident which caused the injury for which he seeks to recover should "immediately and independently of all other causes and wholly and continuously disable and prevent the insured from performing any and every kind of duty pertaining to his occupation." It appears by the policy that the plaintiff's occupation was a lumper in a granite cutting yard, the duties of which employment were "overseeing and changing and boxing granite, loading and unloading cars." The plaintiff's thumb was injured when at work as such lumper and he continued thereafter in the employ of the granite firm in superintending the work that he

had been previously doing. To oversee is to superintend. Webster's Int. Dic. 1024.

It thus appears that he was not wholly and continuously disabled and prevented from performing any and every kind of duty pertaining to his occupation for he continued in the employ of the same firm in connection with his duties, performing them in part, receiving ninety per cent. of his full pay, working nine hours daily instead of ten at the same rate per hour that had been paid him. Under this state of facts he is not entitled to recover.

Judgment of the City Court is reversed and judgment for the defendant for its costs.

BERTHA WERTHEIM, ADMX. v. THE FIDELITY & CASUALTY
COMPANY.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON AND
WATSON, JJ.

Opinion filed June 19, 1900.

Definition—"General count"—A general count in assumpsit is one stating in a general way a claim which a special count would set forth with all needed particularity.

A general count must be appropriate to the cause of action—When one has a claim for which he can recover under a general count in assumpsit, he must, if he would so recover, use a count appropriately framed with reference to the cause of action.

Recovery under a general count on an insurance contract—Construction of Acts 1896, No. 121, sec. 1—Under Acts of 1896, No. 121, sec. 1, a recovery upon an insurance policy can be had under a general count in assumpsit, but it must be under a general count declaring upon an insurance policy.

Act as construed declaratory—The act in question is consistent with what the court might hold without its aid.

GENERAL ASSUMPSIT brought by the plaintiff as administratrix of Aaron Wertheim, deceased, to recover of the defendant on an insurance policy. Plea, the general issue. Trial by court, Chittenden County, March Term, 1900, *Taft*, C. J., presiding. The questions in the case were raised by objections to the evidence in behalf of the plaintiff made by the defendant on the ground that the evidence was inadmissible under the declaration. The court overruled the objections *pro forma*, and rendered a *pro forma* judgment for the plaintiff. The defendant excepted.

M. A. Bingham and *W. L. Burnap* for the plaintiff.

Seneca Haselton for the defendant.

TAFT, C. J. In this action the plaintiff seeks to recover upon a policy of insurance against accident. The plaintiff's intestate was insured 10 February, 1899, and died the following month, his death being caused by an accident resulting from the kick of a horse, 15 February, 1899.

The only question presented in the case is whether the testimony offered in support of the plaintiff's claim, such as the policy of insurance, testimony as to the accident and the resulting death of the intestate therefrom, might properly be admissible under the declaration. The declaration contained the general counts in indebitatus assumpsit for work and labor, care and diligence, materials provided, divers goods, wares, merchandise and chattels sold and delivered, money loaned and advanced, money paid, laid out and expended, money had and received, money due upon an account stated, and for the use and occupation of certain lands, tenements, etc. These are the only counts contained in the declaration and the question arises whether a recovery can be had upon an insurance policy under either of them.

The plaintiff urges that a recovery can be had under the common counts in assumpsit upon the holding in *Bradley v. Phillips*, 52 Vt. 517, "that when there has been a special agreement, the terms of which have been performed so that nothing remains but a mere duty to pay money, the general counts are

sufficient for the recovery of the sum due." This rule cannot be applied in this case for, if it is true that under such circumstances money can be recovered under the general counts, it must be under such a general count as is applicable to the case. No one can consistently claim that under the general count for money had and received, a recovery may be had for the use and occupation of lands, or that under a general count for goods, wares and merchandise a recovery may be had for money paid, laid out and expended.

In a case like *Bradley v. Phillips*, to recover under a general count, there must be a general count appropriate for the recovery of such a claim. A general count is one stating in a general way the plaintiff's claim which in a special count is set forth with all needed particularity. When one has a claim which he can recover under a general count, he must frame such count with reference to it. This is well exemplified in *Beach v. Dorwin*, 12 Vt. 139, in which case it was held that one cannot recover for the use and occupation of premises under a count for money had and received. The opinion reads that "the plaintiff can have no right to recover the avails of the farm for the year * * * unless it be under the appropriate declaration for such claim."

It is a general rule that a plaintiff must recover "*allegata et probata*;" that is, he must allege his claim. Consider for a moment the appearance of counsel who, upon trial, under a claim for goods bargained and sold, should claim to recover damages resulting from the death of a person or a conversion of goods.

It is also insisted that under sec. 1, No. 121, Laws 1896, a recovery can be had under the declaration, for in that section it is enacted that the general counts in assumpsit shall be a sufficient declaration and no other or different one shall be required in order to recover on an accident insurance policy. There are other provisions in this section and the one that follows, which relate to the matter, but do not affect the disposition of the question under the section above referred to.

Construing this section as it reads, there is no question but that under a general count in assumpsit a recovery may be had upon an insurance policy, but it must be a general count declaring upon an insurance policy. There is no consistency in saying that a recovery can be had upon an insurance contract when the count is only for money had and received, money paid, laid out and expended, goods sold and delivered or for goods bargained and sold, for none of these counts is applicable to a recovery upon a contract of insurance. Without the aid of the statute it is possible a recovery might be had under a general count in assumpsit, if the exceptions show, as claimed by the plaintiffs in this case, that all the elements of the contract, both on the part of the decedent and his administratrix, had been fully complied with, and nothing remains for the defendants but to pay over the sum stated in the policy; but it must be under an appropriate declaration counting upon such policy.

I, for one, think that all legislation in regard to the forms of actions or the declarations required in actions is without and beyond the power of the legislative department. It is simply an invasion of the judicial department of the government. I think that questions of pleading of all kinds, and the sufficiency of the pleadings, is a matter that cannot be directed by the legislature. It cannot say to the courts that under a declaration for an assault and battery, you may recover for work and labor, money paid or laid out and expended. Whether a demurrer to a sur-rebutter should be allowed or disallowed is a question that the courts can deal with far better than the legislature. The Act of 1896 is consistent with what the courts might hold without it, and that is that a general count upon an insurance policy may be sufficient. We do hold that, and give the act in question that construction; but we require that in order to recover upon an insurance policy there should be a common count in the declaration declaring in terms upon the contract.

Judgment reversed and cause remanded.

DANIEL M. BARBER v. TOWN OF DUMMERSTON.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and
WATSON, JJ.

Opinion filed July 26, 1900.

Compensation for damages done by dogs—Liability under V. S. 4836 to 4840 attaches to dog-tax fund—Liability under V. S. 4841 attaches to town—V. S. 4841 imposes a new liability and is not retrospective in scope—Before V. S. 4841 took effect one suffering certain damages by dogs could obtain, out of the dog-tax fund of the town, compensation therefor in full or in part according to the sufficiency of the fund, through an appraisal by a selectman or by a selectman and co-appraisers. V. S. sec. 4841 provided that a person suffering such damage might, upon the failure of the selectmen to act, recover his damages of the town in an action of debt. This section created a liability on the part of the town which did not previously exist, and in view of its language and scope was not retroactive in its operation.

Construction of statutes—Retrospective legislation—A statute will not be construed so as to give it retroactive effect unless the intention to give it such effect is clearly expressed in the act or is to be inferred by necessary implication from the language of the act taken in connection with the subject matter of the enactment.

ACTION OF DEBT under V. S. 4841. Heard on demurrer to the declaration, Windham County, March Term, 1900, *Start, J.*, presiding. Demurrer overruled and declaration adjudged sufficient. The defendant excepted and the cause was passed to the Supreme Court before final judgment.

Haskins & Schwenk for the defendant.

H. G. Barber and *Waterman & Martin* for the plaintiff.

THOMPSON, J. The plaintiff seeks to recover of the defendant, damages occasioned by the worrying, maiming and killing of plaintiff's sheep by dogs, June 22, 1893. This action is brought under V. S. sec. 4841, which provides that upon failure of the selectmen of a town to perform the duties prescribed in V. S.

secs. 4836 and 4839, the party suffering the loss may recover the same with costs of such town in an action of debt founded upon sec. 4841. This section was enacted in 1894. The plaintiff's sheep were injured and killed prior to its enactment. The only question raised in argument, is whether sec. 4841 is retrospective in its effect.

It is the rule of law that a statute will not be so construed as to operate retrospectively, unless the intention to give it such force is clearly expressed in the act, or to be inferred by necessary implication from the language of the act taken by itself and in connection with the subject matter of the enactment. *Lowry v. Keyes*, 14 Vt. 66; *Briggs v. Hubbard*, 19 Vt. 86; *Richardson, Admr. v. Cook*, 37 Vt. 599; *Hine v. Pomeroy*, 39 Vt. 211; *State v. Welch*, 65 Vt. 50. Section 4841 creates a liability on the part of towns in respect to such damages, which did not previously exist. There is nothing in the language of this section nor in the subject to which it relates, to indicate that the legislature intended it to apply to cases in which the non-feasance of the selectmen had already occurred at the time it went into effect. On the contrary, its language and scope is such as to clearly indicate that it was intended only to apply prospectively. Therefore the plaintiff's declaration discloses no cause of action against the defendant and its demurrer should have been sustained.

Judgment reversed, demurrer sustained and second count of the declaration adjudged insufficient, and judgment for the defendant to recover its costs.

PLYMINGTON DAGGETT v. CHAMPLAIN MANUFACTURING
COMPANY.

May Term, 1900.

Present : ROWELL, TYLER, MUNSON, STARR, THOMPSON and WATSON, JJ.

Opinion filed July 26, 1900.

Evidence to rebut claim of adverse party—The plaintiff claimed that lumber, delivered by him to one B, was in fact sold to the defendant, and merely delivered to B for the defendant, and further claimed that the fact that a part of the lumber was paid for in notes given by the defendant to B and endorsed by him, was evidence that the sale was to the defendant. The case standing thus it was not error to permit the defendant to show the nature of its transactions with B in respect to the lumber, and that the notes were given in payment of its obligations to B arising out of such transactions.

Absence of evidence equally available to both parties, prejudicial to neither—It not appearing that B was not equally accessible to both parties, and the evidence being as stated in the opinion, it was proper to instruct the jury that no presumption was to be drawn against either party from the fact that B was not called as a witness.

Charge—Instruction presumed to be such as the evidence required unless record shows otherwise—The court instructed the jury that in determining whether the defendant or B purchased the lumber they might consider the manner in which the latter dealt with the lumber, during the time in which it was being delivered to him. It not appearing from the record that the evidence did not require such an instruction, it is to be presumed that it did.

ASSUMPSIT. Plea, the general issue. Trial by jury, Rutland County, September Term, 1899, Taft, C. J., presiding. Verdict for the defendant. The plaintiff excepted.

Joel C. Baker for the plaintiff.

Butler & Moloney for the defendant.

THOMPSON, J. The plaintiff claimed that the defendant by its agent, J. R. McLaren, purchased of him a quantity of lumber, June 1, 1894. This action is brought to recover the price of a part of the lumber alleged by the plaintiff to have been delivered

to the defendant under the contract, and for damages for its refusal to accept the balance of the lumber claimed to have been purchased. The defendant denied having made the alleged purchase and claimed that the plaintiff sold the lumber to one Barnard who manufactured a part of it into chair stock, and that a part of such chair stock was sold to it, with other chair stock, by Barnard. All the lumber was delivered by plaintiff to Barnard, but plaintiff claimed it was so delivered for the defendant. The plaintiff received from Barnard in part payment of the lumber delivered, notes signed by the defendant payable to the order of Barnard, and claimed on trial that such note transactions tended to show that the lumber contract was made by him with the defendant instead of Barnard. The case standing thus, it was not error to permit the defendant to show the nature of his transactions with Barnard in respect to the lumber in question, and that the notes were given in payment of lumber or chair stock purchased by it of Barnard and not for lumber purchased of plaintiff and that it paid Barnard in full for the same. This tended to rebut the claim of the plaintiff that the notes related to a transaction with him, or that the defendant understood that it was dealing with him. All the exceptions to the admission of evidence, insisted upon in argument by plaintiff's counsel, relate to evidence of this character, and therefore cannot prevail.

Barnard was not improved as a witness by either party. The evidence showed that the lumber was delivered to Barnard by the plaintiff; that all payment therefor, had been made by him to plaintiff, that the plaintiff took receipts from Barnard for each load of lumber as it was delivered purporting to show that it had been received by him from the plaintiff, and that about once a month during the delivery of the lumber, statements of account were rendered by him to plaintiff for the lumber, which purported to show an account between them. It also appeared that in October, 1894, after the defendant had refused to receive any more of the lumber and after the plaintiff had ceased delivering it to Barnard, the plaintiff brought a suit

against Barnard on account of the lumber transaction, attaching not only some of the lumber in question, but other property used in Barnard's business. The trial court instructed the jury that no presumption was to be drawn against either party on account of Barnard's absence as a witness. In view of the circumstances above referred to, and the plaintiff's letter to McLaren of Oct. 13, 1894, all strongly tending to show that the plaintiff was dealing with Barnard and not with the defendant, and it not appearing from the record that Barnard was not equally accessible for either party, it was not error to thus instruct the jury.

The plaintiff excepted to the instruction to the jury that in determining whether the defendant or Barnard purchased the lumber, they might consider the manner in which the latter dealt with it during the time it was being delivered to him. It does not appear from the record that the evidence was not such as to require such an instruction. It is to be presumed that it did. Error must be made to appear affirmatively by the record to avail a party in this court. Therefore, this exception is not sustained.

Judgment affirmed.

DORA A. KNAPP v. CAROLINE J. WING.

May Term, 1900.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed August 6, 1900.

Alienation of husband's affections—Loss of consortium—A woman may maintain an action for the alienation of her husband's affections, whereby she is deprived of the conjugal society, aid and support of her husband. Loss of *consortium* is the gist of the action.

Examination of witnesses—Particular question at particular time—Legal right how preserved—A party who is a witness is deprived of no legal right in not being permitted to answer a particular question at a particular time, if he is subsequently allowed to testify to the relevant matter to which the question relates.

Evidence—Influence of property to alienate affections—Amount of property—In an action by a woman against the aunt of her husband for the alienation of his affections, it was proper to introduce evidence tending to show that the aunt attempted to use the influence of her property to effect the alienation, and to show in connection with such testimony the amount of the aunt's property.

Evidence to show malice—In an action by a woman against the aunt of her husband for the alienation of her husband's affections by the aunt, a declaration of the aunt not made in the presence of the plaintiff's husband to the effect that a child of the plaintiff, born during the existence of the marriage, was illegitimate, was admissible in evidence as tending to show malice.

Cross-examination—Examiner not required to put witness on his guard—Purpose of inquiry need not be disclosed—A cross-examiner is not bound to explain the relevancy of an expected answer, nor to state what he expects to show by the cross-examination. To oblige him to do so might defeat the purpose of the cross-examination.

The rule of State v. Nooks, 70 Vt. 247, not applicable to cross-examination—The rule of State v. Nooks, 70 Vt. 247, that in order to reserve an available exception to the exclusion of testimony, an offer must be made of the testimony which the witness will give if permitted to testify, and an exception taken to the exclusion of the testimony so offered, is not applicable to cross-examination.

Inquiry on cross-examination as to subject of correspondence—Inquiry to show knowledge of subject-matter—Correspondence itself immaterial—An inquiry, on the cross-examination of a party, as to the subject of a correspondence had by him with another, put with a view to charging him with knowledge of the subject-matter at the time of the correspondence, is proper without the production of the correspondence itself.

ACTION ON THE CASE in which the plaintiff sought to recover for the alienation of her husband's affections, whereby she had been deprived of his aid, comfort and society. Plea, the general issue. Trial by jury, Rutland County, September Term, 1899, Taft, C. J., presiding.

It appeared that the defendant was an aunt of Rollin F. Knapp, the former husband of the plaintiff whose affections were alleged to have been alienated. The plaintiff testified that she had heard the defendant say to her husband that he should never have a cent of her property as long as he lived with the plaintiff, and she was permitted to testify to declarations relating to the amount of the defendant's property, made by the defendant to the plaintiff's husband. One Mrs. Farr, a witness called by the plaintiff, testified that the defendant had told the witness when the plaintiff's husband was not present that she didn't think a child born to the plaintiff during the subsistence of the marriage between the plaintiff and her husband was legitimate.

After verdict and before judgment the defendant moved in arrest on the ground that the declaration did not state a cause of action.

Butler & Moloney for the plaintiff.

Joel C. Baker and *E. J. Ormsbee* for the defendant.

TYLER, J. I. The declaration states a cause of action, for it alleges loss of *consortium* as the consequence of the defendant's wrongful acts, and the plaintiff can maintain an action in her own name under V. S. 2647. *Story and wife v. Downey and wife*, 62 Vt. 243. The marriage contract between the plaintiff and her husband conferred upon her the right to his *consortium*, and the deprivation of that right by the acts of the defendant was a wrong for which the law should afford a remedy.

It was a maxim of the common law that for every wrong the law provided an adequate redress; but the law was consistent in denying to the wife an action against another woman for debauching her husband, or for alienating his affections from and depriving her of his society and support, for she had no legal existence separate from her husband, and consequently could not hold separate property. If such an action had been maintainable, it must have been brought in the husband's name, and a judgment, if recovered, would have been for his benefit, because of the theory that

the wife's legal existence was merged in that of her husband, and that she had no property in his society and assistance. It is now nearly a universal rule in those states in this country, where the common law disabilities of married women have been removed, that this kind of action is maintainable. It is said in Cooley on Torts, 228, note: "We see no reason why such an action should not be supported, when, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her." Bigelow on Torts, 153; Bishop on Mar. and Div. sec. 1358.

It was said by the court in *Daley v. Gates*, 65 Vt. 591: "If an action of this kind can be maintained by a wife, concerning which we are not called upon to express an opinion, the cause of action is the wrongful deprivation of the plaintiff of that to which she is entitled by virtue of the marital relation, namely, the *consortium*, or the conjugal society, affection, aid and assistance of her husband." The only question in that case was whether a new count was for the same cause of action as the original declaration, which charged that the defendant had enticed away the plaintiff's husband *per quod amisit*, the new count charging criminal conversation, with the same *per quod*, and it was held to be for the same cause and for the reason that the injury complained of in each count was one and the same, namely, loss of *consortium*, the new count being merely the statement of another way in which the injury was committed, the identity of the cause of action being preserved. This doctrine is fully recognized in *Fratini v. Caslini*, 66 Vt. 273.

It is denied in *Doe v. Roe*, 82 Me. 503, and in *Morgan v. Morgan*, 92 Me. 190, that the wife is entitled to this action, even in case of her husband's adultery, and it is held that the action is allowed to the husband for that cause only upon the ground that the wife's infidelity may impose upon her husband the support of another man's child and throw suspicion upon the legitimacy of his own children. This holding we are not inclined to follow.

Mr. Freeman, in his notes to *Clow v. Chapman*, 125 Mo. 101, 46 Am. St. R. 468, says that Maine and Wisconsin stand alone in maintaining the above doctrine, and he states the general rule, that the action is maintainable when there is loss of *consortium*, and that it is as available to the wife, unless she is under the common-law disability, as it is to the husband. The law is well stated in Schoul. on Husb. & Wife, sec. 65: "To entice away, or to corrupt the mind and affections of one's consort is a civil wrong for which the offender is liable to the injured husband or wife." See *Foot v. Card*, 58 Conn. 1, 18 Am. St. R. 258; *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. R. 597; *Gernerdt v. Gernerdt*, 185 Penn. St. 233, 66 Am. St. R. 646 and notes.

II. The plaintiff introduced evidence tending to show that the defendant told the plaintiff's husband that the plaintiff was not fit to be his wife, nor the mother of his children, and made other derogatory statements to him about her. The defendant offered evidence tending to show that on an occasion the plaintiff went to her house and struck her a severe blow in the face while the defendant was standing in her door talking with the plaintiff's husband, and that a week later the plaintiff went to the defendant's house and assaulted her with a stool and injured her, and that the conversation which the plaintiff's evidence tended to show took place that evening in the defendant's house between the defendant and the plaintiff's husband was after the assault with the stool and while the defendant was suffering from it; that the conversation was not what the plaintiff claimed it was, and that it was in consequence of that assault. The defendant was allowed to testify, without objection, to the first assault. Defendant's counsel then asked the defendant the question, "Did anything happen during the coming week?" which the court excluded. Although the defendant was not permitted to describe the assault with the stool, in detail, she did subsequently testify that after it occurred, on the same evening, she sent for the plaintiff's husband and had the conversation with him which the plaintiff and her witness testified to have overheard; that she

did not then say what the plaintiff had testified to, but that she did advise a separation by means of which a divorce might subsequently be obtained, and that what she then said was from fear of the plaintiff caused by the assaults. The defendant was therefore deprived of no right by not being permitted to answer the question above recited.

III. It was not error to admit evidence tending to show that the defendant attempted to use the influence of her property to alienate the husband from the wife, and in that connection to show the amount of property she possessed.

IV. The testimony of Mrs. Farr, in substance, that the defendant said to her, when the plaintiff's husband was not present, that the child was illegitimate, was admissible as tending to show malice.

V. The plaintiff's evidence tended to show that after her return from Burlington the defendant made remarks to the plaintiff's husband about the paternity of a child to which the plaintiff subsequently gave birth ; that the defendant asked him if he had roomed with the plaintiff so that he had an opportunity to be the father of the child, and that upon his replying that he had she said he could not even then be sure it was his. The apparent purpose of this evidence was to have the jury understand that the defendant implanted in the husband's mind the idea that the child was illegitimate. The defendant then proposed but was not permitted to cross-examine the plaintiff with a view to show by her that the legitimacy of the child had been a subject of correspondence between the plaintiff and her husband while she was in Burlington. It was clearly competent for the defendant to cross-examine the plaintiff upon this subject and to show by her, if she could, that the defendant did not originate the charge of the child's illegitimacy, but that the plaintiff and her husband had discussed the matter some time previously. The ruling deprived the defendant of a legal right. The plaintiff claimed that this alleged slander was one means used by the defendant to separate her husband from her, and it was compe-

tent to cross-examine her to show that the story had a prior origin, and that the husband had knowledge of it prior to the statements made by the defendant.

It was held in *State v. Nooks*, 70 Vt. 247, that, "to reserve an available exception to the exclusion of the testimony of a witness, an offer must be made stating the testimony the witness will give if permitted to testify, and an exception taken to the exclusion of the evidence so offered. An exception to the exclusion of a question only, is not sufficient." This rule applies to the examination of a party's own witness for the reason that he is supposed to know what his witness will testify to. But, to be compelled to state what one expects to show by the cross-examination of his adversary's witness would often defeat the purpose intended by putting the witness on his guard. Besides, the examiner does not always know what he may reasonably expect to bring out in the cross-examination of a witness. The rule is and should be that the cross-examiner is not bound to explain the relevancy of the answer expected. 8 Ency. of Pl. & Pr. 114.

The plaintiff's counsel contend that if the correspondence was material, the letters should have been produced as the best evidence, and they raise the further point that no offer was made to prove a fact. The correspondence itself, was not material. The question did not call for the contents of letters, but it asked upon what subject they were written. The previous discussion between the plaintiff and her husband, implying knowledge, was the fact that the defendant sought to show.

For the error in denying the right to cross-examine,

The judgment is reversed and cause remanded.

NATHAN N. POST, Admr. v. ROYAL B. KENERSON.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed August 6, 1900.

Original book as independent evidence—Acceptance of drafts shown by book.—

An original book of accounts honestly kept in the regular course of business showing credits for commodities received and charges for drafts accepted is admissible as tending to show the acceptance of drafts as entered thereon.

Mere form not material to the admissibility of book as independent evidence.—

The manner of keeping accounts and their purpose rather than their form is the important consideration in determining whether entries thereon, contemporaneous with the transactions they record, are entitled to admission as independent evidence.

GENERAL ASSUMPSIT brought by the plaintiff as administrator of O. A. Burton's estate to recover for butter sold and delivered by his decedent to the defendant. Pleas, the general issue, payment, accord and satisfaction, the statute of limitations and offset. Trial by court, Franklin County, March Term, 1899, *Munson J.*, presiding. Judgment for the defendant on facts found. The plaintiff excepted.

The drafts of August 7 and August 31, referred to in the opinion, were not produced. There was evidence to show the accidental destruction of some of the papers of the plaintiff's decedent and some of the papers of the defendant. Neither party produced evidence from the books of any bank. Under the findings of the trial court the sole question was as to the admissibility of the defendant's book.

Farrington & Post for the plaintiff.

Wilson & Hall for the defendant.

TYLER, J. The court below found that the plaintiff's decedent owned a farm in Swanton from which butter was shipped to the defendant for sale on commission; that the defendant re-

ceived the butter charged in the last fourteen items of the plaintiff's specification, and was accountable for it at the prices carried out, which amounted to \$698.97. The plaintiff claimed that \$613.66 of this amount remained unpaid, while the defence was that payments had been made to more than cover the entire amount. The question was whether two certain drafts drawn by the decedent upon the defendant had been accepted by him. It had been the decedent's practice to draw upon the defendant, at thirty or sixty days, for round sums, generally even hundreds of dollars, on the strength of shipments about to be made. Such drafts were accepted by the defendant, and during the life of the acceptance butter was received and sold by him and accounts of sales were rendered by him to the decedent. If the drafts of August 7 and August 31, 1889, were in fact accepted by the defendant, then nothing was due from him to the decedent's estate, and this depended upon whether the defendant's books were admissible as independent evidence of the fact of such acceptance. The other party to the contract being dead they could not be used by the defendant as memoranda. The court finds in relation to these books :

"Three books, introduced by the defendant, are submitted herewith, that their exact character may be ascertained by examination. They were the only books kept by the defendant. The entries were made in due course as the transactions occurred. They embrace credits for goods received and charges for drafts accepted. We have found nothing in our examination of them to indicate that they were not honestly kept, but they do not always contain the material necessary for the statement of a complete account, as is apparent from an examination of the Burton entries from the settlement of July 3rd, 1888, to the first credit now in controversy. Charges to balances are made and memoranda of settlement entered where the items included do not show a balance."

The books are memorandum books in form, rather than regular account books, though the pages are four inches wide by

eight long and ruled with money columns. On the fly leaf of each is written, "B. F. Kenerson's Butter Book," and they purport to contain memoranda of the defendant's butter transactions with various persons. The manner in which these memoranda were kept is illustrated by the following quotation:

| | | |
|------------|---|----------|
| " 3rd May. | | |
| " | O. A. Burton | Cr. |
| " | By 3 tubs butter | 35 |
| " | 61 ² -9 ² , 62-9 ² | 83 |
| " | 61 ² -9 May 18 | |
| " | 185-28 ² -157 18 | 25.61 |
| Dr. | | |
| " | To acceptance | |
| " | 30 days | 200.00 " |

The manner of keeping the accounts and their purpose, is the important consideration, rather than the form of the books themselves. An original entry may be made upon a diary, or a book or paper, and be entitled to be received as independent evidence. *Gleason & Field v. Kinney's Admr.*, 65 Vt. 560. If the books only contained memoranda of payments to Burton they would have been inadmissible, for the law will not permit a party to make a memorandum of a fact and introduce it as evidence of that fact when he is by statute denied the right to testify to it. *Paris v. Bellows' Estate*, 52 Vt. 351. Nor can mere private memoranda, without proof that they were made as original entries, become independent evidence. *Godding, Admr. v. Orcutt*, 44 Vt. 54; *Barber v. Bennett*, 58 Vt. 476. Such entries can only be referred to by a witness to refresh his recollection of what transpired, when they were made at that time of or soon after the transaction. *Barber v. Bennett*, 62 Vt. 50; *In Re Diggins' Estate*, 68 Vt. 198.

These books were the only ones kept by the defendant; the entries were honestly made and in the usual course of his business, and included credits for butter received and charges for

drafts accepted. They were properly received in evidence under V. S. 1239.

Judgment affirmed.

GEORGE M. DELANEY v. LESLIE R. BROWN and FRED HOWES.

May Term, 1900.

Present : ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 26, 1900.

*Equitable interference with proceedings at law—Unfair advantage gained by mistake or fraud—*When by mistake or fraud one has gained an unfair advantage, in proceedings at law, which will operate to make the court of law an instrument of injustice, equity will interfere to prevent him from reaping the benefit of the advantage thus unfairly obtained.

*Rule as to judgment obtained and judgment retained the same—*The rule is the same whether the unfair advantage has been used in obtaining a judgment, or in retaining a judgment while the defendant yet had his day by the law to be heard on the question of setting it aside.

*Equitable jurisdiction original and concurrent—*In such cases courts of equity have original and concurrent jurisdiction.

*Trustee deprived of day in court by accident—Reliance upon agreement to treat judgment as void.—Loss of right to petition at law—Equitable relief—*If a judgment creditor agrees to treat as null and void a judgment, obtained by default against a trustee who was deprived of his day in court by accident, and the trustee in reliance upon such agreement refrains from bringing a petition to have the judgment set aside until his right to do so is barred, he is entitled to equitable relief upon a showing that he was not in fact liable to be adjudged trustee, and that he ought not in equity and good conscience to pay the judgment against him.

*Question of laches—*In proceedings brought, in such circumstances, by the judgment debtor for equitable relief, the judgment creditor will not be heard to claim that the orator was guilty of laches in believing him truthful and honest and in acting upon such belief.

Definition—"Illness" within the meaning of "accident" as used in V. S. 1667—One who is prevented from appearing in court by illness is deprived of his day in court by "accident" within the meaning of that word as used in a provision of the charter of Burlington akin to V. S. 1667.

CHANCERY. Heard on demurrer to the bill, Chittenden County, March Term, 1900, *Taft*, Chancellor. Decree sustaining the demurrer and dismissing the bill for want of equity. The orator appealed.

Cushman & Mower and *Brown & Macomber*, for the orator.

Powell & Powell for the defendant.

THOMPSON, J. In June, 1894, the defendants brought suit against A. A. Niebaum returnable before the City Court of the City of Burlington, June 19, 1894. In this suit the orator was duly summoned as trustee of Niebaum. At the time the suit was brought Niebaum was not a resident of this State and personal service was not made on him. On the return day of the writ, and from time to time thereafter, the suit was continued by the City Court, for notice to Niebaum, until September 12, 1894, when judgment by default was rendered by that court against him for the sum of \$419.82 including costs of suit; and at the same time judgment was rendered by default against the orator as trustee for Niebaum for \$419.82. The orator's bill alleges that at the time of the rendition of such judgment, he was prevented from appearing in court by reason of then being detained in the City of Montreal, Canada, by sickness; that at that time, and at the date of the service of the writ on him, he did not have in his hands any goods, chattels, rights, or credits of the said Niebaum, nor did he have at any time, for which he should have been adjudged liable as trustee; that the orator returned from Montreal about September 13, 1894, to Burlington and made known to the defendants his claim that he was not liable as trustee of Niebaum and applied to them and their attorney to have the judgment against him as trustee stricken off, that

this was not done, but on the contrary the defendants, September 13, 1894, took out an execution against the orator on said judgment and levied the same on certain property as his property but which belonged to one Rafferty ; that such property was replevied by Rafferty and that while the replevin suit was pending, Niebaum for the benefit of himself and the orator brought a writ of review returnable before said City Court September 21, 1895; that before the writ of review was entered in court but while it was in force and pending, the defendants agreed with the orator that they would make no further attempt to enforce their judgment against him as such trustee, and that the same should be regarded as null and void as to him; that said writ of review was not entered in court and that from the making of this agreement, the orator has relied thereon and in consequence, has done nothing to protect himself from said judgment and that in violation of this agreement, the defendants brought their suit against him on said judgment, returnable to said City Court March 13, 1899, and therein seek and claim to recover the same with interest thereon of the orator ; and that said suit is now pending in County Court by appeal from the City Court.

The orator among other things prays that the defendants may be perpetually enjoined from enforcing said judgment and to have the same decreed to be null and void. He also prays for general relief. The defendants demurred to the bill for want of equity, insisting that the orator has a complete defence at law if he has any defence, and consequently that equity has no jurisdiction. It is not necessary to discuss what right to relief, if any, the orator would have had, if Niebaum had entered and prosecuted his writ of review to final judgment. Assuming that he could have had no benefit therefrom, not being a party of record thereto, it would make no difference in this proceeding. The orator as the law then stood was entitled to bring his petition to said City Court within two years from the rendition of the judgment against him, to have the same set aside on the ground that he was deprived of his day in court by accident, for clearly being

prevented from appearing in court by illness falls within this ground of relief. Nor is it necessary to consider the effect of the correction of the judgment by the City Court so as to make it \$100 less than the sum stated in the original record of the judgment. From the time of entering into the alleged agreement until after January 1, 1899, the defendants made no claim that they considered the judgment in force against the orator and never said nor did anything to apprise him that they still considered it to be a valid, subsisting claim against him. They thus lulled him to sleep so far as availing himself of his legal right to petition the court to set aside the judgment until long after his right to invoke the aid of a court of law in that behalf, was barred by the statute limitation of two years. It is to be taken from the allegations of the bill, that the orator was not in fact liable to be adjudged trustee of Niebaum, and that if compelled to pay the amount of the judgment, he will be compelled to pay that which in equity and good conscience he ought not to pay, and that which he could not be compelled to pay were it not for the judgment. Negligence cannot be imputed to him because he relied upon the agreement of the defendants, to treat the judgment as null and void. The defendants in view of the circumstances of the case, cannot now be heard to charge the orator with laches in believing them to be truthful and honest and in acting in accordance with such belief. After having thus induced him to so act, until by the lapse of time he is deprived of his opportunity to have the judgment set aside by the court which rendered it, it is fraudulent and inequitable for the defendants to now attempt to enforce the judgment in violation of their agreement. This case, in principle, falls within the class of cases at law, where by means of the deceitful representations and fraudulent conduct upon the part of the plaintiff, the defendant, having a meritorious defence, is prevented from interposing it. The general rule on this subject is well defined and clearly established. It is this: "Whenever, by plaintiff's fraudulent conduct or representations to defendant concerning the nature and objects of the action, or the

purpose of the judgment, or the prosecution of the cause, defendant in the action, having a good defence upon the merits, is lulled into security so that he fails to interpose his defence, he is entitled to the aid of equity to prevent the plaintiff from reaping the benefit of a judgment thus fraudulently obtained." 1 High on Inj. (2nd ed.) sec. 199, 200; Pomer. Eq. Juris. (1st ed.) sec. 1364 and note 1; Kerr's Inj. 23*; Kerr on Fraud & Mistake, 293, 352; *Wagner v. Shank*, 59 Md. 313; note to *Oliver v. Pray*, 19 Am. Dec. 603; *Currier v. Esty*, 110 Mass. 536; *Kelley v. Kriess*, 68 Cal. 210; *Hibbard v. Eastman*, 47 N. H. 512.

The relief is allowed in such case upon the ground that when by mistake or fraud one has gained an unfair advantage in proceedings at law, which will operate to make the court of law an instrument of injustice, equity will interfere to prevent him from reaping the benefit of the advantage thus unfairly obtained. 1 High on Inj. (2nd. ed.) sec. 199. In such cases equity has original and concurrent jurisdiction.

The application of this rule is the same whether the fraudulent conduct and deceitful representations of the plaintiff were used by him to obtain such a judgment at law, or to retain it while the defendant yet had his day by the law to be heard on the question of setting it aside. In either case, such defendant is lulled into seeming security by the fraud and thus deprived of his day in court as to the merits of the cause. Under this rule, the orator is clearly entitled to relief in equity.

Decree reversed and cause remanded, with mandate that the demurrer be overruled and the bill adjudged sufficient.

JOSEPH YATTER v. M. E. SMILIE.

May Term, 1900.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 26, 1900.

Presumption as to attachable property of absent debtor—A debtor who has been absent from and resident without the State is, during the period of his absence and non-residence, presumed to have had no known attachable property within the State unless the contrary appears.

Execution—Rule as to a year and a day a rule of the common law—Execution on dormant judgment—The rule that an execution cannot issue on a judgment that has lain dormant more than a year and a day is not an inference from the statutes, but is a rule of the common law which the statutes assume and recognize.

Execution—Debtor's absence from the State—Limitation as to time of issue not analogous to the statute of limitations—The rule as to the time within which an execution may issue is not modified by the debtor's absence from and residence without the State. In this respect it is not analogous to the statute of limitations.

Execution—Time for issuance extended only for sufficient reasons—It is only when a sufficient reason exists for not taking out an execution within the time limited by the general rule, that the time is extended, and then the extension is not in analogy to the statute of limitations, but is by virtue of an exception to the general rule which is a part of the rule itself.

Insufficient reasons—Debtor's absence from the State—Alias and pluries executions—The debtor's absence from and residence without the State do not afford a sufficient reason for not keeping a judgment active by successive executions.

Insufficient reasons—Pendency of scire facias against bail—Successive executions—The pendency of an action of scire facias against bail is no reason for not taking out successive executions.

Insufficient reasons—Issuance ineffectual towards satisfaction—The fact that the taking out of successive executions would avail the creditor nothing in getting satisfaction of his judgment, is no reason for not taking out such executions, and does not keep the judgment active unless by force of some statute. See V. S. 1792.

Consent to surrender by bail no waiver—The debtor's coming into court for surrender by bail does not operate as a waiver of time in respect to the issuance of an execution.

V. S. 1723—No implication of right to execution upon surrender—The fact that the statute provides for the surrender of the debtor by his bail “that his body may be taken in execution” does not raise an implication of a right to an execution on surrender. A surrender merely restores the debtor to his former custody.

Construction of statutes—Enlargement by implication—Necessity for implication must exist—A statute is not to be enlarged by implication unless implication is necessary to make it effective in the accomplishment of the purpose it was designed to subserve.

V. S. 1723—Application of the above rule—Under V. S. 1723 by taking out successive executions the creditor may preserve the right to take the body of the debtor in execution on his surrender by bail and hence no implied enlargement of the statute is necessary to render it effective.

PETITION FOR A MANDAMUS to compel the issue of an execution brought to the Supreme Court, Washington County, May Term, 1900, and heard on petition and answer at the same term.

Reference is made to the case of *Yatter v. Pitkin & Miller*, ante, page 255.

John G. Wing and *Edward H. Deavitt* for the petitioners.

Melville E. Smilie, pro se.

ROWELL, J. In October, 1888, the petitioner recovered a judgment in this court against Omer Miller in an action of tort wherein Miller's body was arrested and Pitkin and Wm. Miller became his sureties by indorsing their names on the writ as bail. The petitioner took the requisite steps to charge the bail, and afterwards brought his writ of *scire facias* against them, returnable to the May Term, 1890, of this court for Washington County, wherein such proceedings were had that at this present term the bail surrendered the principal into court in discharge of their liability, according to the statute in such case made and provided, and an *exoneretur* was entered on the record. Thereupon the petitioner applied to the defendant, as he is clerk of this court, for an alias execution, which was denied, and this petition is brought to compel its issuance. Before and at the time of the rendition of said judgment, the said Omer Miller was absent from and resided out of, the State, and ever since has and still does

reside thereout; and presumably, the contrary not appearing, has had no known attachable property therein during that time. *Burnham v. Courser*, 69 Vt. 183.

The judgment has lain dormant ever since the original execution was returned, which was more than eleven years ago, no other execution having been taken out. But the petitioner contends that he is entitled to take out another now on two grounds; first, because of the debtor's absence from and residence out of the State, with no known attachable property therein; and second, because the statute provides that on surrender the court shall order the principal into custody for a time, "that his body may be taken in execution." V. S. 1723.

On the first ground the argument is, that the rule that an execution cannot regularly issue on a judgment that has lain dormant more than a year and a day is a limitation inferred from the statute, and that therefore the time of the debtor's absence from the state should not be taken as a part of the time limited, in analogy to the modifying provisions of the statute of limitations in such cases; and further, that by coming into court for surrender, he waives the limitation of time, and consents that his body may be taken in execution. But the limitation is not an inference from the statute, but is a common-law rule, assumed and recognized by the statute but not born of it, and cannot be administered in analogy to it in the respect claimed; for it is only when a sufficient reason exists for not taking out an execution within the time that the time is extended; and then, not in analogy to the statute, it is a part of the rule itself. Here no reason existed why executions could not have issued often enough to keep the judgment active. The pendency of the *scire facias* is no reason. Nor is the fact that it would have availed the petitioner nothing in getting satisfaction of his judgment; for in *Catlin v. Merchants Bank*, 36 Vt. 572, it was held that the continued existence of a prior attachment of the debtor's real estate was no reason why successive executions should not have been taken out on a subsequent attaching creditor's judgment; and

because that was not done, an execution issued more than a year and a day after the rendition of the judgment was held to have been irregularly issued ; and yet, to have issued one sooner would have been of no avail except to keep the judgment active. This has since been changed by statute.

As to his coming into court being a waiver of the limitation of time and a consenting that his body may be taken in execution, it cannot be said to be either. The custody of the bail was merely a substitute for the custody of the officer, and his surrender was but returning him to his former custody, which was an alternative of the bail's undertaking. When that was done, the petitioner had what he had in the first place, namely, the body of the defendant in custody, and could proceed against him according to his right.

On the second ground the argument is, that the principal can be surrendered only that his body may be taken in execution, and therefore that the statute impliedly gives the right to an execution on surrender, and if not, that there can be no surrender.

But this view is not tenable. A statute is not to be enlarged by implication unless it is necessary in order to make it effective to accomplish the object that it was designed to subserve. But here is no such necessity, for the petitioner could have kept his judgment active by taking out successive executions, which he neglected to do.

Petition dismissed with costs.

MARGARET SULLIVAN v. DELAWARE & HUDSON CANAL
COMPANY.

May Term, 1900.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 26, 1900.

Evidence—Facts unconnected without proof of like conditions—If, as is not here decided, the quality of an act or thing, whether prudent or negligent, safe or dangerous, can be proved by showing that in conditions like those in the concrete case it has produced similar favorable or injurious results; still, if the conditions are not substantially the same, the evidence is not relevant.

Illustration—The case—The plaintiff was injured in falling over a plank incline maintained by the defendant at the door of a freight-room, and claimed that the defendant was negligent in having the incline as it was, and in not lighting the place where it was. An offer to show that the incline had for thirty years been maintained and used as it was at the time of the injury, but which ignored the matter of leaving the place unlighted, was irrelevant.

The case—Question of defendant's negligence for the jury—Some of the testimony was such as to permit the argument that the incline, maintained as it was, was a structure as necessary as any door step, while other testimony tended to show that it might have been movable, and away when not in use, or that its purpose might have been answered by an incline built inside the freight room, and that the incline, as maintained, was not properly lighted at the time of the accident. In this state of the evidence the question of negligence on the part of the defendant was for the jury.

The case—Question of contributory negligence for the jury—There being testimony tending to show that the incline was in a way which the plaintiff might properly take in going to the defendant's waiting room for passengers, and that neither that way nor any other was lighted, it could not be said, as matter of law, that the plaintiff was guilty of contributory negligence.

CASE FOR NEGLIGENCE. Plea, the general issue. Trial by jury, Rutland County, September Term, 1899, Taft, C. J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

William H. Preston and *F. S. Platt* for the plaintiff.

Butler & Moloney for the defendant.

ROWELL, J. The east end of the defendant's depot at Castleton was used for passengers and the west end for freight. The building was entirely surrounded by a platform about eight inches lower than the floor of the building. The plaintiff was injured by falling over a plank incline, fastened to the platform at the freight-room door, and used for getting freight in and out. It was evening, and the plaintiff's testimony tended to show that there were no lights on the platform at the time; and was dark there. "It seemed perfectly dark," as one witness put it. There were lights in the waiting-room, and the defendant's testimony tended to show that the platform was lighted. The plaintiff claimed only that the defendant was negligent in not having the platform lighted and in having the incline as it was.

The defendant offered to show that the depot had been used as a railroad station for thirty years or more next before the time in question, and that during all that time the incline had been maintained in substantially the same position as then, and had never caused an accident.

If, as many of the cases hold, the quality of an act or a thing, whether prudent or negligent, safe or dangerous, can be proved by showing that in conditions like those in the concrete case it has produced similar favorable or injurious results; still, if the conditions are not substantially the same, the evidence is not relevant. Steph. Dig. Ev. Chase, 2d ed. 34, n. 1.

Here the defendant denied the condition of darkness claimed by the plaintiff; and as the offer did not contain that element, it did not present substantially the same conditions as the case presented, and for that reason, if for no other, it was not relevant.

The defendant moved for a verdict, for that the evidence did not tend to show negligence on its part, but did show negligence on the plaintiff's part. On the first point it is argued, that the incline was a necessary and lawful structure, as much as any

doorstep, and its maintenance not negligence. But while some of the defendant's testimony tended to show that it was necessary to have the incline maintained as it was, other of it tended to show that it might have been movable, and away when not in use, or that one might have been built in the freight room itself that would have answered the purpose. This, coupled with the plaintiff's testimony that it was dark there, made a case for the jury on this point.

On the question of contributory negligence it is argued, that the direct way to the waiting-room was lighted, and that the plaintiff voluntarily went the other way in the dark without looking. But the testimony tended to show that neither way was lighted; that as many went one way as the other; and that if she had looked she could not have seen the incline. This made a case for the jury on this point also.

Judgment affirmed.

H. B. PARKHURST v. WILLIAM BROOK.

May Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed July 26, 1900.

Construction of contract not to engage in a particular business.—One who has agreed not to carry on the wood business does not break the agreement by letting one man have two cords of stove wood for cutting ice for him and giving a tenant eight cords in lieu of fixing up the house occupied by the tenant.

Definition—"Business" as used in contracts in restraint of trade—The word "business" as used in contracts not to engage in a particular business denotes an aggregation of acts rather than an isolated act or two performed as a matter of special convenience or interest.

DEBT ON SPECIALTY. Pleas, the general issue, and license. Trial by jury, Orleans County, March Term, 1899, *Watson*, J., presiding. Verdict directed for the plaintiff to recover \$500, as liquidated damages. Judgment on verdict. The defendant excepted.

O. S. Annis for the plaintiff.

F. S. Rogers and *J. W. Redmond* for the defendant.

ROWELL, J. The parties being separately engaged in buying and selling wood in North Troy and vicinity, the defendant sold his wood to the plaintiff, and agreed not to engage, nor be interested, "in the wood business, that is to say, in buying, selling or furnishing wood * * * in said North Troy nor in the immediate surrounding vicinity," so long as the plaintiff was engaged in that business there; and for a breach, to forfeit \$500 as liquidated damages. The defendant then lived in North Troy, but some months after, moved onto a farm six miles away, and has lived there ever since. At one time while living there, he let a man in North Troy have two running cords of stove wood for cutting ice for him. At another time, he gave a tenant in one of his houses in North Troy, eight cords, instead of fixing up the house and making it warmer, and to keep the tenant from going out. These are the claimed breaches. But they are no breaches. The word "business" is not used in the contract to denote an isolated act or two of disposing of wood for the special convenience and interest of the defendant, but an aggregation of acts that may fairly constitute the carrying on of the "wood business" as defined in the contract. This is the meaning given to the word in the construction of contracts of insurance, and in determining whether the testimony shows a violation of agreements of the character of the one in suit. Thus, in *Hoagland v. Segur*, 38 N. J. L. 237, the defendant agreed to abandon and not engage in the business of banking; and it was held that the single act of taking deposits was no breach. So in *Turner v. Evans*, 2 El. & Bl. 512, the defendant agreed not to carry on the business of a

wine merchant within certain limits. But he systematically solicited orders therein and filled them, though he had no place of business there; and it was held a breach, because he did it on system, the court saying that if he had done it only now and then, to oblige an old customer or the like, it would have been no breach, for it would not have been carrying on business. A solicitor does not "carry on business" outside of the limits within which he is authorized to practice by his certificate, merely because of a single isolated transaction outside of those limits. *In Re Horton*, 45 L. T. 541.

The cases of *Clark v. Crosby*, 37 Vt. 188; *Barry v. Harris*, 49 Vt. 393; *Stevens v. Pillsbury*, 57 Vt. 205 and *Borley v. McDonald*, 69 Vt. 309—relied upon by the plaintiff—are not opposed to this view. *Clark v. Crosby* does not touch the question. The others are properly distinguished by the defendant's counsel when they say that "in each, it is not the particular act that is held to constitute the breach, but the fact that the defendant had entered upon a business, a systematic course of action, of which the specific acts were the natural outcome."

There being no evidence to sustain the verdict,

Judgment reversed, verdict set aside, and cause remanded.

LAMOILLE COUNTY NATIONAL BANK v. B. A. HUNT.

May Term, 1900.

Present: ROWELL, TYLER, MUNSON, START, and THOMPSON, JJ.

Opinion filed July 26, 1900.

Jury trial—Jury drawn from part of the array—A party is not entitled to have the jury drawn from the array, though all the jurymen are at liberty. His full right is to have his cause tried by an impartial jury, and this right is presumably accorded him when the jury is drawn from the array, exclusive of the jurymen who have served in the next preceding cause.

Pleadings—Denial of leave to amend discretionary with trial court—The election of the plaintiff, in an action of assumpsit, to waive the special counts in his declaration and go to trial on the general counts, does not give the defendant the legal right to amend his pleading. A denial of leave so to amend is discretionary, and not revisable in the Supreme Court.

If defendant would file a new plea as of right, the nature of the plea must be disclosed—Plea of res judicata after suit commenced—It will not avail one who has been denied leave to replead generally to claim in the Supreme Court, for the first time, that he wanted to plead *res judicata* after suit commenced.

Jury interrogated when general verdict is returned—Answer of jury as a special verdict—Special verdict found agreeably to the usages of law—A finding of a jury that appears from the answer of the foreman, assented to by the rest of the panel, and given when the general verdict is returned, is a part of the verdict, and effective as such, when it is determinative of the substance of an issue raised and submitted.

Finding as related to issues formed—A special finding of payment, in an action of assumpsit in which no plea of payment after suit commenced was interposed, shows payment before the commencement of the action.

Promissory notes—Signer of note expressly promising as principal cannot defend as surety—If one, in signing a note with another, expressly promises as principal, he waives all rights as surety, though he is in fact such, and though the payee so knows when he accepts the note.

Promissory notes—Joint and several principals—Waste of securities under plea in offset—Mutuality of demands—In a suit on a note brought by the original payee against one of two joint and several principals, waste by the payee of collateral securities, furnished by the principal not sued, cannot be shown in offset.

Promissory notes—Joint and several principals—Waste of securities—Failure of consideration—Other defences—In a suit on a note brought by the original payee against one of two joint and several principals, waste by the payee of collateral securities, furnished by the principal not sued, is no defence by way of failure of consideration or otherwise.

GENERAL AND SPECIAL ASSUMPSIT. The plaintiff elected to go to trial upon the general counts in his declaration, and withdrew the special counts from the case. Trial by jury, Lamoille County, June Term, 1899, *Watson*, J., presiding. Verdict directed for the plaintiff. Judgment on verdict. The defendant excepted.

After the jury was drawn the defendant moved to discharge the jury already called, for the reason that it had not been called from the whole number of jurors in attendance. It appeared that the trial of the preceding case was ended and the jury in that case discharged the night previous to the impaneling of the jury in this case, and that in drawing the jury in this case the clerk of the court drew from the jurors in attendance, exclusive of those who had served in the preceding case. The motion to discharge the jury was overruled.

The defendant asked leave to amend his pleadings upon the ground that the action of the plaintiff in withdrawing the special counts of his declaration was a surprise to him, and that he could not go to trial safely under his pleadings already filed. The court declined to allow such amendment.

The plaintiff sought only to recover upon a note of the tenor following:

“\$699.00

August 30, 1894.

For value received we each as principal jointly and severally promise to pay the Lamoille County National Bank of Hyde Park, at their banking house in Hyde Park, six hundred and ninety-nine dollars in thirty days from day of discount with interest after due.

F. C. WHITING.

B. A. HUNT.”

The plaintiff against the objection of the defendant proved the acceptance and discount of the note by the record in a former suit between the same parties begun more than thirty days before the commencement of this action.

The defendant offered to show: that in fact he was merely surety on the note in suit and that the plaintiff so knew when, if ever, it accepted and discounted the note; that former notes given to the plaintiff of which the note in suit was a renewal, were signed by the defendant as surety, the word surety being ap-

pended to his signature ; that such former notes were secured by the deposit with the plaintiff of collateral securities that the plaintiff had allowed to be wasted before the execution of the note in suit ; that the defendant was ignorant of such waste at the time the note in suit was executed ; that the note in suit was executed by the defendant in reliance upon figures furnished by the plaintiff to the defendant as a true statement of the amount due on the former notes at the time the note in suit was executed ; and that the note in suit was secured by the deposit with the plaintiff by Whiting, the co-signer with the defendant, of collateral securities, and that such securities had been wasted and misapplied by the plaintiff.

The evidence offered by the defendant was excluded.

R. W. Hulburd and *Bates, May & Simonds* for the plaintiff.

George M. Powers and *B. A. Hunt* for the defendant.

ROWELL, J. The defendant was not entitled to have the jury drawn from the array, though at liberty. His full right was accorded when he had an impartial jury to try the case, as presumably he had. *Quinn v. Halbert*, 57 Vt. 178.

The plaintiff waived the special counts, and elected to go to trial on the general counts. Thereupon the defendant asked leave to amend his pleadings, for that he was surprised by the action of the plaintiff, and could not safely go to trial on the pleadings as they were. The denial of leave was discretionary and not revisable. The defendant now claims that he wanted to plead *res judicata* after suit commenced, and that such was his right. But it does not appear that he informed the court below that he wanted to plead that, and therefore he cannot stand on that ground now.

The note in suit is dated August 30, 1894, payable thirty days from discount, and signed by F. C. Whiting and the defendant. In a former suit between these parties on certain other notes, commenced July 8, 1896, the defendant pleaded

payment, and the jury found that two of said notes were paid by the note in suit and twenty-five cents. That finding appears from the answer of the foreman, assented to by the rest of the panel, in reply to a question by the court when the general verdict was returned. To the admission of the record in that case, to show that the bank accepted and discounted the note in suit, the defendant objects that said special finding forms no part of the verdict, but is merely a narrative of what transpired in the jury room, and is not a special verdict, found "agreeably to the usages of law," within the meaning of the statute, and that in order to make it such, the question should have been submitted to the jury before it retired, that it might receive the consideration its importance required.

But it is settled law in this State that such findings are a part of the verdict and effective as such, especially when, as here, they are determinative of the substance of the issues raised and submitted.

This suit was commenced the same day the verdict was rendered in the former suit, and it is said that if said special finding is to stand, it does not show, nor does it otherwise appear, when the note in suit was discounted in payment—that it might have been within thirty days of the commencement of this action, and so not due when sued, and that therefore a verdict should have been directed for the defendant. But it must have been discounted before the former suit was commenced, else the finding of payment, which is conclusive upon the parties, could not have been what it was, for no plea of payment after suit commenced was interposed.

The defendant's offer to show his suretyship for Whiting on the notes for which the note in suit was given, and the plaintiff's waste of Whiting's collaterals therefor, and the defendant's ignorance of it when he signed the note in suit, and his reliance upon the bank's figures as to the amount due on those notes,—was properly excluded. By expressly promising as principal in the note in suit, the defendant waived all rights as surety,

and stands no better in this suit in respect of said waste of security than Whiting himself would stand, as to whom it would be no defence by way of failure of consideration nor otherwise, except perhaps as matter of set-off, of which the defendant cannot avail himself, for as he is sued alone, there is no legal mutuality, the bank being liable to him jointly with Whiting if at all. *Mott v. Mott*, 5 Vt. 111, which holds that in a suit against two and only one served, he may plead in set-off a demand in favor of both, is criticised in *Adams v. Bliss*, 16 Vt. 42, and has not for a long time been regarded as sound. *Johnson v. Kelley*, 67 Vt. 386.

Although the defendant may be surety for Whiting on the note in suit, as he offered to show, and although the bank may have wasted securities placed with it by Whiting as collateral thereto, as claimed, yet that does not release the defendant from liability on the note, because of the capacity in which he contracts, even though the bank knew of his suretyship. *Pitts v. Congdon*, 2 N. Y. 352; *Marshall v. Aiken*, 25 Vt. 327; *Herrick v. Orange County Bank*, 27 Vt. 584.

Judgment affirmed.

DAVID L. FULLER v. MILO D. PARMENTER, TRUSTEE AND
CLAIMANT.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed July 26, 1900.

Assignment by heir of his expectancy—Notice to ancestor—Novus actus interveniens—An agreement fairly made for a valuable and an adequate consideration, by which an heir assigns his expectancy in his ancestor's estate, if the ancestor has notice of the assignment and does not object, may be given life and vigor by some new act in furtherance of the original disposition done after the ancestor's death.

Sufficient new act—Notice to administrator given by the assignee, with heir's consent—Notice to the administrator of an ancestor's estate, given by the assignee with the consent of the heir, is a new act sufficient to give efficacy to an assignment by the heir of his interest in the ancestor's estate, made while the interest rested in expectancy.

Consent of ancestor not requisite—Notice without objection sufficient—It is not essential to the efficacy of the assignment that the ancestor should have assented. It is enough that he had notice and did not object.

Findings based on proper evidence unaffected by reception of improper evidence—In this case the question of error in the reception of certain evidence by the commissioner, was not considered, since the facts which such evidence tended to prove were found on other evidence to which no objection was urged.

DEBT ON JUDGMENT. Principal defendant defaulted. Heard as to the liability of the trustee and the contention of the claimant on commissioner's report, Washington County, September Term, 1899, *Watson*, J., presiding. Judgment was rendered discharging the trustee and in favor of the claimant. The plaintiff excepted.

The trustee was the administrator of the estate of Luther M. Parmenter, deceased. The defendant, Milo D. Parmenter, and the claimant, George W. Parmenter, were sons of Luther M. Parmenter.

Edward H. Deavitt for the plaintiff.

Fred L. Laird for the claimant.

ROWELL, J. The defendant, by an agreement fairly made and for a valuable and an adequate consideration, sold and assigned his expectancy in his father's estate to his brother, the claimant, of which his father had notice, and to which it does not appear that he objected. After the father's death, and after the trustee was appointed administrator of his estate and before the trustee process was served on him, the claimant notified the administrator of the assignment. The defendant's share of the estate has been ascertained to be \$542, which the administrator holds in his hands to await the result of this suit; and the question is whether the plaintiff shall have it or the claimant. It is to be

noticed that the defendant is not trying to void the assignment, but has ratified it since his father's death by receiving from the claimant for cancellation, before this suit was commenced, one of the notes that it was given to pay.

Lord Bacon says that "the law doth not allow of grants except there be a foundation of an interest in the grantor; for the law that will not accept of grants of titles nor of things in action that are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future. But of declarations precedent before any interest vested, the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigor to the declaration precedent." Bac. Max. Reg. 14. It is said in *Lunn v. Thornton*, 1 C. B., at page 386, that Lord Bacon takes the first part of this rule, namely, that a disposition of after-acquired property is altogether inoperative, as beyond question, and labors only to establish the second part, namely, that life and vigor may be given to the declaration by some act or conveyance after the property is acquired; that this evidently imports more than the mere acquisition of the property at a subsequent time, and points to some new act to be done by the grantor in furtherance of the original disposition. It is said in *Holroyd v. Marshall*, 10 H. L. 191, 216, that if after the property comes into existence the assignor delivers it to the assignee, or allows him to take possession of it, there would be the *novus actus interveniens* of the rule, and that the title would pass. A good illustration of such an act is afforded by *Peabody v. Landon*, 61 Vt. 318, in which said rule is recognized, and which holds that taking possession of after-acquired property by the mortgagee with the consent of the mortgagor, brought it within the operation of the mortgage as of the time of its execution, and protected it from the mortgagor's assignee in insolvency appointed in proceedings subsequently commenced.

In the case at bar the claimant could not take possession of the defendant's share of the estate, for the administrator had a right to hold it for the purpose of administration, and all he

could do was to give notice of his claim, which he did, and in the circumstances, it is taken that he did it with the consent of the defendant. This was a *novus actus interveniens* that gave life and vigor to the assignment as against the plaintiff, as it antedated his attachment; for under our law that notice stands in place of taking possession. *Ward & Co. v. Morrison & Tr.*, 25 Vt. 593, 600. We have always held that notice by the assignee to the debtor, of the assignment of a non-negotiable chose in action, perfects the title of the assignee against the assignor's subsequent attaching creditors.

It remains to consider whether the intestate's assent to the assignment is necessary to its validity, or whether it is enough that he had notice of it and did not object. It is contended that the claimant was not a competent witness to prove notice. But notice is also found on the testimony of the administrator alone, to whose competency no objection is made.

Some cases hold that the ancestor must not only have notice of the assignment, but must actually assent to it, because otherwise it would be a fraud upon him, and against public policy to enforce it. *Boynton v. Hubbard*, 7 Mass. 112, and *McClure v. Raben*, 133 Ind. 507, 36 Am. St. Rep. 588, are of this class. On the other hand it is held that notice, even, is not necessary, much less assent, if the contract is otherwise fit to be enforced. This question is considered in *Hale v. Hollon*, 90 Texas, 427, 59 Am. St. Rep. 819, in which the cases, English and American, are very fully discussed, and the conclusion reached that neither in England nor by the weight of authority in this country is assent necessary. In many of the cases in this country in which the contract was enforced, no mention is made of notice nor assent, while in others it is said that if the ancestor had notice and did not object, it is sufficient. This is said in *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651, which adopts the language of Judge Story, who says that if the transaction has been fully made known to the ancestor and is not objected to by him, the extraordinary protection generally afforded by courts of equity in such

cases will be withdrawn. He goes on to say that it has been strongly said that it would be monstrous to treat the contract of a person of mature age as the acts of an infant, when his parent was aware of his proceedings and did not object to them. 1 Eq. Jur. sec. 339. This was said by Lord Chancellor Brougham in *King v. Hamlet*, 2 Mylne & Keene, 456, who also said that if all the cases be examined from the time of Lord Nottingham down, no trace will be found in any one of them of the father's or the ancestor's privity; but that on the contrary, wherever the subject is touched upon, his ignorance is always assumed as a part of the case; and that its being so seldom mentioned either way, shows clearly that their privity was never contemplated.

It would seem, therefore, that assent is not necessary, but that notice and not objecting is enough, if even that is required; and this is the reason of the thing, for with notice the ancestor can defeat the assignment if he will, and thus prevent the fraud upon him that the books talk about.

Judgment affirmed.

STATE v. GEORGE W. SMITH.

May Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed August 29, 1900.

Impaneling the jury—Preliminary examination—Business relations with contemplated witness—Discretion of trial court—In impaneling the jury in a criminal case, it was within the discretion of the court not to permit the respondent to inquire of the jurors as to whether they were clients of an attorney who was to be improved by the State as a witness.

Impaneling the jury—Preliminary examination—Remote prejudice or bias—Discretion of trial court—In a prosecution against a deputy sheriff for bribery touching the performance of his duties under the prohibitory

law, it was within the discretion of the County Court to refuse the respondent permission to inquire of the jurors as to their views of that law and as to the relative degree of fidelity which they would require in the administration of that law.

Dependent evidence—Evidence affecting the probability of a fact which other testimony tends to show—In connection with evidence of declarations of a respondent, tending to show that at the time of the declarations he had in his possession a warrant against a certain person ready to serve, evidence tending to show that on the day in question a complaint with an unsigned warrant against such person had been put into his hands in behalf of the proper state's attorney, with the request that the respondent get the warrant signed by the proper authority, was admissible as bearing upon the probability of its being so signed at the time of the declarations.

Evidence—Declarations of party as admissions—Subsidiary evidence—Tendency and sufficiency of evidence.—Evidence tending to show declarations of a respondent that he had a certain warrant ready to serve, together with evidence that such a warrant as he claimed to have, filled out but not signed, had on the day in question been put into his hands, in behalf of a proper prosecuting officer, with the request that the respondent get it signed by a proper authority named, was evidence tending to show the existence, in the possession of the respondent at the time of the declarations, of such a warrant as he then claimed to have, and was sufficient to be submitted to the jury upon that point.

Evidence—Proof of acceptance of money—Proof that one assumed control of money passed over into his possession as a gift by another, and that the one to whom it was so passed over understood at the time that he accepted it, and that the money had thereby passed from the control of such other person into his control, shows an acceptance of the money.

Criminal law—Evidence—Silence under accusation express or implied—The evidence tending to show that the respondent was surprised with money on a table before him, in a manner conveying an accusation of crime in taking it, the fact that he did not then deny that he had accepted it was proper for the jury to consider upon the question of his guilt.

Criminal law—Evidence—Showing steps preliminary to consummation of crime—Solicitation of a bribe—Negotiations culminating in bribery—In connection with evidence tending to show that a bribe was accepted by the respondent on a certain day, evidence of negotiations with reference to the bribe preliminary thereto and leading up to it was admissible.

Criminal law—Evidence—Conduct tending to show guilt—The question being whether money, found on a table before the respondent at a time when

he was surprised, had been received by him as a bribe, testimony to the effect that the respondent said to those who had so surprised him when shortly left alone with them, "Now we are all alone, can't we fix this up some way?" had a legal tendency to show the respondent's guilt.

Criminal law—Practice—Election between counts charging same offense—Trial court may or may not compel election—When an indictment is in two counts for the same offense, it is not a legal right of the respondent to have the state elect at the close of the evidence upon which count it will rely. The trial court may in its discretion grant or deny a motion to have such election compelled.

Charge—Weight of evidence for jury, but legal tendency for court—It is for the jury to determine the weight of evidence in proving or disproving the issue on trial, but it is for the court to instruct them as to its legal tendency.

Charge—General exception taken to be to the law involved and not to an inference of fact—A general exception to an instruction may properly be taken to have been to the law involved therein, and not to an inference of fact from the evidence made in stating the particular phase of the case to the jury.

Charge—Recital of evidence—Substantial correctness—Leaving evidence and its weight to memory and judgment of the jury—An exception to a claimed misstatement of testimony by the court in the course of its charge to the jury was not sustained, it appearing from the record that the testimony in question was stated with substantial correctness, and that the jury were cautioned to rely on their own recollection of the evidence, and that the weight of the testimony was left to the determination of the jury.

Charge—Appropriate statement of unquestioned law—The evidence of the State tended to show that a sheriff and an attorney surprised the respondent with money before him which he had received as a bribe, and that the respondent inquired of the sheriff and the attorney if the matter couldn't be "fixed up," and that one of them replied that he didn't know of any way to compromise crime. In commenting upon this conversation it was proper for the court to tell the jury that the compounding of the bribery, if that offense had been committed, would be a crime.

Charge—Criminal law—Definition of bribery—General definition and concrete instruction taken together—In charging the jury in a prosecution under V. S. 5086, the court defined bribery by saying: "Bribery is the receiving or offering any undue reward, by or to any person whomsoever, whose ordinary business or profession relates to the administration of

public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity." This definition includes the element of a corrupt intention, and an understanding that the person accepting the thing offered shall be influenced thereby in his official acts, and this definition and a further explicit instruction to the effect that the crime charged was not made out unless such corrupt intent and such understanding were found beyond a reasonable doubt, must have prevented the jury from finding the respondent guilty on less than the requisite proof.

Charge—Criminal law—Bribery—Substantial compliance with respondent's requests.—An instruction to the jury to the effect that to convict the respondent of bribery they must be satisfied beyond any reasonable doubt that the respondent had a warrant to search the premises of the person from whom it was alleged that he took the bribe, and that he accepted money from her to influence his action in the matter of the service of the warrant, and that he accepted the money with the felonious intent to be corruptly influenced thereby in the discharge of his official duties in serving the warrant, was a full compliance with certain of the respondent's requests the substance of which is stated in the opinion.

Charge—Criminal law—Bribery—Requests not applicable to the evidence—Abstract requests.—The respondent, a deputy sheriff, having solicited a bribe from one B which B decided to give, arrangements, to which B was a party, were made in consequence of which the consummation of the crime was witnessed by others and the respondent arrested. In this there was no conspiracy to decoy or lure the respondent into crime, and requests founded upon the theory that there was, dealt only with abstract questions and were properly denied.

Arrest of judgment—One count good and verdict general.—When the evidence tends to support both counts of an indictment drawn in two counts, one of which is good, and there is a general verdict of guilty, it is understood that the jury find the respondent guilty on both counts, and judgment will not be arrested for the insufficiency of one count.

INDICTMENT in two counts under V. S. 5086 for bribery. Trial by jury, Washington County, September Term, 1899, *Watson*, J., presiding. Verdict, guilty. Judgment on verdict. The respondent excepted.

The first count in the indictment charged, in substance, that on the 8th day of July, 1899, at Montpelier, in Washington

County, the respondent, a deputy sheriff, had a legal warrant duly issued from the City Court of said Montpelier, commanding him to arrest one Clementina Bianchi on a criminal charge set forth in a complaint of the state's attorney for said county, and that the respondent not regarding his duty in that behalf and the command of said court, did corruptly, wilfully and feloniously accept a gift and gratuity of money, of the value of seventy-five dollars, with the understanding that he would be influenced thereby in his said official act of serving said warrant and arresting the said Clementina Bianchi, and with the understanding that by reason of said gift and gratuity he would not serve said warrant and would not arrest the said Clementina Bianchi as commanded by said warrant.

The second count of the indictment charged in substance that on the 8th day of July, 1899, at Montpelier, in Washington County, the respondent, a deputy sheriff, did wilfully, corruptly and feloniously accept a gift and gratuity of the value of seventy-five dollars, from one Clementina Bianchi, of said Montpelier, with the understanding that by reason of the said gift and gratuity he would be influenced in his official acts as such deputy sheriff in serving warrants and other process upon the said Clementina Bianchi and of serving search warrants in the house of said Clementina Bianchi in said Montpelier.

In the impaneling of the jury the respondent's counsel asked leave to examine the jurors as to whether any of them were clients of William A. Lord, an attorney who was to be one of the witnesses in the case. Such examination was not permitted.

The respondent's counsel also asked leave to examine the jurors as to their belief in the prohibitory liquor law, and as to whether they would require a different degree of faithfulness in the discharge of a duty under that law than they would in the execution of duty under any other law. Such examination was not permitted.

The evidence on the part of the State tended to show that on July 4, 1899, one M. M. Gordon, acting for the state's attorney

for Washington County, handed to the respondent two complaints signed by said state's attorney, one of which, on due allegations, prayed for a warrant to issue from the City Court of Montpelier directing search for intoxicating liquor to be made on the premises of the said Bianchi in Montpelier, and the other of which charged the said Bianchi with owning, keeping and possessing intoxicating liquor with intent to dispose of the same in violation of law. The evidence of the State further tended to show that unsigned warrants, such as the complaints respectively called for, were attached to these complaints, and that, in so delivering the complaints to the respondent, the said Gordon asked the respondent to have the warrants signed by the judge of the City Court of Montpelier, and to search the said premises of the said Bianchi. The evidence on the part of the State further tended to show that on the same 4th day of July the respondent went to the house of the said Bianchi and told her that he had with him a search warrant for the search of her house, to see if he could find any liquor, that he had a paper all ready to search the house, and that upon being asked to show his warrant he produced as such warrant a paper having the name of the said Bianchi upon it.

The respondent claimed that the warrants referred to were never signed, and introduced in evidence complaints with unsigned warrants attached, which he claimed to be the papers delivered to him by said Gordon as aforesaid. The substance of the testimony of Mr. Gordon as to the identity of these papers is set out in the opinion.

A narrative of what the evidence of the State tended to show as to the circumstances of the bribery found by the jury is as follows :

When, as above stated, the respondent went to the house of Mrs. Bianchi on July 4th and told her that he had a search warrant to search her premises for intoxicating liquor and showed a paper which he claimed was such warrant, he told Mrs. Bianchi that if she would pay him one hundred dollars he would not

search the house. Mrs. Bianchi asked for what purpose she had to pay him that money, and he replied, in substance, that he had ten or fifteen witnesses who had been up to her house to drink, and that the best thing was for her to pay the money; that he had come to serve the warrant and take her away if she didn't pay it, and that, if she settled with him for the one hundred dollars, he could save her two hundred or three hundred dollars the next time.

Mrs. Bianchi did not then agree to pay, but told the respondent that she couldn't pay then and that he would have to wait a few days. On the 7th of the same month the respondent again went to the house of Mrs. Bianchi, and again referred to the matter of the payment of the money and was told by her that she had not the money ready, and that he would have to wait until the next day or the day after, whereupon the respondent went away.

In the meantime Mrs. Bianchi had consulted with William A. Lord, an attorney at law, and under his advice and by his direction, arrangements were made such that Mr. Lord and Charles C. Graves, sheriff of Washington County, went to the house of Mrs. Bianchi on the next day, the 8th of July, at about one o'clock in the afternoon and remained there until about six o'clock. The respondent not coming during that time, Mr. Lord and Sheriff Graves made arrangements for a son of Mrs. Bianchi to go to the respondent and tell him that if he wanted to see Mrs. Bianchi he had better come that evening, as she was going away the next day.

The son acted accordingly, and the respondent, the same afternoon or evening, went to the house of Mrs. Bianchi and met her in the sitting room of said house. Mrs. Bianchi opened the conversation about the money by asking the respondent if she had got to pay him that hundred dollars, and he replied: "Why, no, you haven't got to pay it to me, there is no way I can compel you to pay it to me, but you know, as I told you the other day, there are other matters pending—those witnesses,—and if you don't

pay me it will cost you a good deal more, and it will be a great deal better for you if you pay it to me."

Mrs. Bianchi then said: "Well, now if I pay you this hundred dollars, what do I get for it?" and the respondent replied: "Well, this matter—these cases—this pending case—that ends that, and then you will get protection in the future. If there are any warrants out against you in any way, I am in a situation to know it, and you will be informed of it and you will get protection." At this point the respondent asked if there was any one in the back room, referring to an adjoining room over the door-way of which there was only a curtain. Mrs. Bianchi replied, "no," and then spoke of her being poor, and asked the respondent if he couldn't take \$75, if that wouldn't settle it. The respondent replied: "Well, this is pretty—scaly business for me, but I guess I can fix it up with those other people. You understand that I am not to have this money; I can fix it up with those other people. Yes, I will take \$75." Thereupon Mrs. Bianchi counted out the sum of \$75 in money, counting aloud, and put the money on a small centre table up to which the respondent was then sitting, putting the money close to the edge of the table, next to and directly in front of the respondent; the respondent said either "I thank you," or "I am much obliged," and added, "That will settle the matter."

During this conversation and these proceedings, Sheriff Graves and Mr. Lord had been secreted in the adjoining room referred to by the respondent in his inquiry of Mrs. Bianchi, and they now came into the room where the respondent was and the sheriff demanded and took the money and arrested the respondent. Shortly after, the sheriff, Mr. Lord and the respondent were left alone in the room, and the respondent then said to Mr. Lord and the sheriff: "Now we are all alone, there is nobody here, and can't we fix this up some way?" The sheriff replied, "George, there has been too much fixing up, and I don't know of any way;" and Mr. Lord said that he didn't know of any way to compromise the crime.

There was evidence tending to show that the course of conversation and conduct on the part of Mrs. Bianchi, at the time of her interview with the respondent last recited, was generally, but not particularly, in pursuance of a plan that had been formed by Mr. Lord and Sheriff Graves and communicated to Mrs. Bianchi, and that she was told by the sheriff that the respondent should not take the money from the house.

When the State rested its case, the respondent moved the court to direct the State to elect upon which count in the indictment it would rely for conviction. The motion was overruled.

The respondent moved the court to instruct the jury to return a verdict of not guilty, on the ground that the State had failed to introduce any evidence tending to support the indictment. This motion was also denied.

Questions were saved by the respondent upon the denial of requests to charge, and in respect to the charge as given, all of which so far as they were relied on in the Supreme Court sufficiently appear from the opinion.

The question whether the respondent had a warrant properly signed at the time made material by the evidence was submitted to the jury and no exception was taken to the charge in that regard.

After verdict and before judgment the respondent moved in arrest of judgment. This motion was overruled.

Richard A. Hoar, State's Attorney, for the State.

H. William Scott for the respondent.

THOMPSON, J. I. It was not error for the trial court not to permit the respondent to examine jurors as to whether they were clients of W. A. Lord who was to be improved as a witness. Whether they were his clients or not in no way affected their competency as jurors so far as disclosed by the record. It was clearly within the discretion of the court to permit or refuse the inquiry. Nor was it error for the court not to permit the respondent to examine the jurors "as to their belief in the prohibi-

tory law and as to whether they would require a different degree of faithfulness in the discharge of a duty under that law than they would in the execution of duty under any other law or process." Such inquiry could have no tendency to determine the question whether the jurors were legally qualified to try the respondent for the crime of bribery with which he was charged. The refusal of the inquiry was clearly within the discretion of the court and so far as the record shows such discretion was properly exercised. 1 Thomp. on Tr., secs. 73, 101; *Com. v. Buzell*, 16 Pick. 154; *State v. Flint*, 60 Vt. 314; Thomp. and Merriam on Juries, secs. 193 and 245, (6).

II. It was a material question whether the respondent had in his possession a complaint and properly signed warrant against Mrs. Bianchi at the time he took the alleged bribe from her and during the negotiations leading up to it. When the complaint and warrant were delivered to him July 4, 1899, the warrant was not signed, and against his exception, the State was permitted to show by the witness, Gordon, that at the time of such delivery, he requested the respondent to have the warrant signed by the clerk of the City Court of Montpelier. Gordon was the clerk of the state's attorney, and in what he did, acted for him. The subsequent declarations of the respondent put in evidence tended to show that he had such a warrant properly signed at the time in question. This testimony of Gordon tended to show how the respondent came to have the warrant and in connection with his declarations bore upon the probability of its being properly signed. Hence it was not error to admit it.

III. The bribe was taken by the respondent from Mrs. Bianchi July 8, 1899. Subject to the exception of the respondent, the State was permitted to introduce evidence tending to prove that he went to the house of Mrs. Bianchi July 4, 1899, and then and there informed her that he had in his possession a search warrant to search her premises for the purpose of finding intoxicating liquor therein kept in violation of law, and that he then and there entered into negotiations with her to pay him \$100

not to serve the warrant, and that when he left her house on that occasion the matter of such payment was left open for her consideration.

The specific ground of this exception was that what transpired between Mrs. Bianchi and the respondent July 4, was not connected with the transaction of July 8. But this contention is contrary to the facts of the case. The evidence tended to show that the negotiations of the respondent with Mrs. Bianchi for the payment of the bribe were resumed July 7, and finally consummated in what occurred July 8, when a bribe of \$75 was finally paid him by her and accepted by him. What occurred between them July 4, and from thence on until the money was paid July 8, was part of the transaction, and together constituted it. It is always permissible to show the various steps taken by the accused in committing the crime with which he is charged.

IV. The two counts in the indictment were for one and the same offence. The respondent excepted to the refusal of the trial court to compel the State to elect upon which count it would rely for conviction. It was clearly within the discretion of the court to grant or deny this motion. Its action was in accord with the established practice of this State. 1 Bish. Cr. Proc. (1st ed.) secs. 205 and 208.

VI. At the time in question, the respondent was a deputy sheriff, and in what he did in respect to the warrant against Mrs. Bianchi, he was acting as such deputy sheriff.

In charging the jury the court in speaking of bribery, among other things said: "Bribery is the receiving or offering any undue reward, by or to any person whcmsoever, whose ordinary business or profession relates to the administration of public justice, in order to influence his behavior in the office, and to incline him to act contrary to his duty and the known rules of honesty and integrity," to which the respondent excepted. Vermont Statutes, sec. 5086, under which the respondent was indicted, provides that "An executive, legislative or judicial officer, who corruptly accepts a gift or gratuity, or a promise to make a gift or to

do an act beneficial to such officer, with the understanding that he will be influenced thereby in any official act, shall forfeit his office, be forever disqualified to hold any public office, trust or appointment under the State, and be imprisoned in the state prison not more than ten years, or fined not more than one thousand dollars." The respondent contends that the definition of bribery given by the court was erroneous, because it does not state that the gift or gratuity must be accepted with a corrupt intent and with the understanding that the party accepting the same will be influenced thereby in an official act, and that these are essential elements of the offence under the statute. The definition used by the court is that given in Bouvier's Law Dictionary and is supported by authority. 1 Russ. on Crimes *154; 2 Bish. Cr. Law (4th ed.) sec. 95. It includes corrupt intention, and the acceptance of the gift or gratuity with the understanding that the party accepting it shall thereby be influenced in his official acts. The court further instructed the jury in substance that, in order to convict, they must be satisfied beyond a reasonable doubt that the respondent received the money with the corrupt intent and with the understanding that he should be corruptly influenced thereby in his official acts as such deputy sheriff. The charge on this point was so explicit that the jury could not have been misled by it into finding the respondent guilty on less proof than required by V. S., sec. 5086. This exception is not sustained.

VII. While instructing the jury, the court, referring to the testimony of Gordon in respect to a complaint and blank warrant produced by the respondent on trial, said, "that he thinks the complaint and blank warrant shown him upon the stand was the one that he made out and handed to this respondent for that purpose. He says he is not positive of that." To this the respondent excepted and now contends that it was a misstatement of Gordon's testimony not cured by the further instruction to the jury that they were to take the testimony as they remembered it and not as the court stated it, as it might be mistaken about it.

When interrogated as to the identity of the blank warrant, Gordon first said that he did not know whether or not it was the one he gave the respondent July 4; upon further inquiry he said "I think that is the one—I am satisfied now." Q. "You are satisfied now?" Ans. "It is my judgment that it is the one, but I wouldn't be positive." Again, a few questions later, he said, "I think it is. I am satisfied that it is." Nowhere in the testimony was he more positive in regard to the identity of the paper in question. Taken as a whole, the court correctly stated to the jury the legal tendency of this evidence, and this exception cannot avail the respondent, as the weight of the testimony was left to the determination of the jury.

VIII. The respondent excepted to the charge of the court as to what would constitute an acceptance by the respondent of the money claimed to have been paid him by Mrs. Bianchi as a bribe. The instruction was in substance that, if she paid him the money and passed it from her control to his, and he assumed control of it, understanding at the same time that he accepted it, and that it thereby had passed from her control into his, it would constitute an acceptance by him. In this there was no error. The evidence tended to show that he accepted and assumed control of the money.

IX. The conduct of the respondent, when surprised by Sheriff Graves and W. A. Lord, with the money on the table before him, and the fact that he did not then deny having taken it, was in evidence, and the court properly charged the jury that it bore upon the question of the acceptance of the money by him. The exception to this part of the charge was general and the court had a right to understand that the exception was to the law involved in the instruction, and not to the language used in narrating the occurrence to the jury. Hence this exception cannot avail the respondent, and it is not necessary to decide whether the court made an improper inference from the evidence in stating this phase of the case to the jury.

X. Shortly after the respondent was thus surprised by Graves and Lord, they were left alone in the room with him, and he then said to them, "Now we are all alone, there is nobody here, and can't we fix this up some way;" and Graves replied, "George, there has been too much fixing up, and I don't know of any way;" and Lord replied that he didn't know of any way to compromise crime. The court charged the jury that what the respondent thus said was evidence tending to prove his guilt, to which he excepted. The respondent now contends that this instruction was erroneous because it was for the jury to say whether this evidence tended to show guilt. It is for the court to instruct the jury as to the legal tendency of evidence and for the jury to determine its weight in proving or disproving the issue on trial. The evidence in question clearly tended to prove the guilt of the accused, and the instruction was correct.

Had Lord and Graves taken money, or a gratuity or reward, or an engagement therefor, upon an agreement or understanding, express or implied, to compound or conceal the crime which the respondent had committed, they would have become guilty of the crime of compounding felony, as the respondent's offence is a felony. V. S. secs. 5165, 5166. It was not error for the court to say to the jury that if Lord, Graves and the respondent had, in fact, thus fixed up the crime, hushed it up by a division of the money or in any other way, they would all of them have committed a crime by so doing. The court stated the law correctly, and it is not contended otherwise. *State v. Fournier and Cox*, 68 Vt. 271. The fact that the respondent thus proposed the commission of another felony to conceal the one already committed by him, bore upon the weight of this evidence and was proper for the jury to consider.

XII. After verdict and before judgment, the respondent moved in arrest of judgment, which was denied, and to this ruling he excepted. The only ground now urged in support of that motion is that the second count is insufficient. The evidence tended to support both counts of the indictment. No question

is made but that the first count is good. The verdict was general. The verdict being general, it is to be understood that the jury found the respondent guilty on all the counts. In such case, the rule is that if any count is sufficient, judgment will not be arrested. *State v. Downer*, 8 Vt. 425; *State v. Davidson*, 12 Vt. 303; *State v. Hooker*, 17 Vt. 669; *State v. Bean*, 19 Vt. 530; *State v. Bugbee*, 22 Vt. 32; *State v. Wheeler*, 35 Vt. 265; *State v. Ward*, 61 Vt. 194; 2 Ency. Pl. and Pr. 801; *Com. v. Holmes*, 17 Mass. 335. The motion in arrest of judgment was, therefore, properly overruled.

The above opinion was written by *Thompson, J.*, but the Court were not agreed in reference to points V and XI, as written by him, and since his death the following has been agreed to in respect thereto. Therefore,

PER CURIAM. V. The respondent insists that the court should have sustained the motion for a verdict, for that "the evidence does not substantiate the first count in that it was not shown that the respondent had a warrant." There was testimony tending to show that fact, viz., that of M. M. Gordon, who testified that he gave him an unsigned one with directions to procure the signature of the proper authority to it, and testimony tending to show the respondent's declarations to Mrs. Bianchi, that he had a warrant to search her premises. This was testimony tending to show the existence of such a warrant in the possession of the respondent. The motion was properly overruled.

XI. (a) The respondent presented ten requests for instructions. Numbers 1, 8 and 9 are not in the record and are therefore waived. The substance of the requests, numbered 2, 3, 4, 5, and 10, is that the jury must be told that in order to convict they must find that at the time when, etc., the respondent had a legal warrant, duly issued by competent authority, which it was his duty to serve and return as therein commanded; that he accepted and received from one Bianchi the \$75 as a gift in consideration, and with the understanding between them, that he

would be influenced thereby to neglect his official duty and not serve the warrant and that he was so influenced. In response to these requests, the jury were told that they must be satisfied beyond any reasonable doubt that the respondent had a warrant to search Mrs. Bianchi's premises, that he accepted the money, the \$75, and that it passed into his control to influence his action as an officer in the matter of the service of the warrant, and that he accepted the money with the felonious intent to be corruptly influenced thereby in the discharge of his official duties in serving the warrant. This was a full compliance with the requests.

(b) The testimony did not require a compliance with the sixth and seventh requests. There was no testimony in the case tending to show that the transaction was a decoy, nor that Bianchi, Lord, and Graves entered into a conspiracy to cause the respondent to commit the crime. He was not lured into a net or snare. He, himself, set the trap and it does not relieve him from the effect of his crime, that the audience that witnessed its springing was larger than he anticipated and had foreknowledge of the scene to be witnessed. The questions involved in these requests were abstract ones, and were therefore properly ignored.

Judgment that there is no error in the proceedings of the County Court and that the respondent take nothing by his exceptions. Let sentence be pronounced and execution done.

STATE v. CHARLES DOHERTY.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START AND THOMPSON, JJ.

Opinion filed August 29, 1900.

Criminal law—Evidence to show preparation—Evidence of premeditation when the crime charged is murder—In a trial for murder in which the evidence of the State tended to show that the respondent shot and killed the

deceased with a revolver, evidence that, the night before the shooting, the respondent purchased the revolver with which he shot, tended to show preparation and premeditation and was admissible.

Evidence of unconnected fact—Evidence that about five months before the shooting in question the respondent had a worthless and unserviceable revolver which he threw away had no tendency to qualify or explain the purchase by the respondent the night before the shooting was done, of the revolver with which he shot the deceased.

Evidence—Remote fact—Assuming, however, that evidence of the possession by the respondent, five months before the homicide with which he was charged, of a rusty and unserviceable revolver which he threw away, would have a remote tendency to qualify or explain the purchase by the respondent of a revolver the night before the shooting in question, such evidence was properly excluded on the ground of remoteness.

Evidence—Ruling as to remoteness not ordinarily revisable—Moreover, the ruling of the trial court upon the question of the remoteness of offered evidence is ordinarily not revisable in the Supreme Court.

Evidence—Offer must show relevancy—In support of the claim that a revolver was purchased by the respondent for the purpose of self-protection, an offer to show threats against him by a third person is not relevant, unless it appears from the offer that the threats were made before the purchase of the revolver.

Immaterial evidence not entitled to corroboration—A respondent does not by introducing immaterial evidence acquire the right to corroborate it by further immaterial evidence.

Submission of hypothetical question to opposing counsel—Counsel have no legal right to have a hypothetical question submitted to them for examination before it is put. The matter of stating a question to the court out of the hearing of the jury is referred to by way of illustration.

Lack of opportunity to examine hypothetical question—No disadvantage unless objection could have been made which was not—Lack of opportunity to examine a hypothetical question before it was put cannot be considered to have worked any disadvantage to the party complaining of such lack of opportunity, unless he can show in the Supreme Court that some tenable objection to the question might have been made which was not made.

Exceptions to questions and answers without discussion—Progress of trial promoted—Rights of excepting party to be protected—While no question can be made in the Supreme Court that was not raised below, an exception can be taken to any part of a question or to the testimony contained in the answer, and if the exception is a valid one, the right of

the party can thereby be maintained. Any other practice would tend to retard the progress of a trial.

Expert testimony—Scope of hypothetical question—Weight of testimony distinguished from admissibility—The opinion of an expert witness based on a portion of the case is admissible. The range of the facts in evidence to which it relates affects the weight of the testimony elicited rather than its admissibility.

Homicide—Time for premeditated determination to kill—The evidence of the State tended to show that the respondent went into a barn and then left the same and walked smartly a distance of some fifteen or twenty feet, when he shot the deceased. There was time, in the circumstances which the evidence tended to show, for forming the premeditated determination to kill after the respondent left the barn.

Homicide—Respondent a witness—Failure to deny intent to kill just before the homicide—That the respondent, who as witness in his own behalf testified that he had no intent to kill when he went into the barn, nor while he was in the barn, did not testify that he had no such intent when he went out of the barn, was a circumstance for the jury to consider in determining the question of the respondent's guilt, and the degree of his crime if they found him guilty.

Homicide—Fear, fright, nervousness and cowardice—Fear, fright, nervousness and cowardice on the part of a slayer, bear the same relation to the homicide as do anger and heat of blood.

When fear, fright, nervousness and cowardice are consistent with murder—If fear, fright, nervousness or cowardice on the part of a slayer are without such provocation as the law regards as sufficient justification for anger and heat of blood, a homicide, which independently of these conditions is murder, is not thereby rendered manslaughter or justifiable homicide.

When fear, fright, nervousness or cowardice render a homicide manslaughter—If, in an encounter with another, one draws a revolver and fatally shoots his antagonist, and the drawing and use of the revolver is an afterthought, subsequent to the encounter, and is wholly due to then present nervousness, fear, anger, or cowardice, the killing is manslaughter, unless it is justifiable homicide.

Homicide in self-defense—Justifiable homicide—Bearing of fear, fright, nervousness and cowardice—If one sees another coming towards him in a hostile attitude, and the circumstances are such as to reasonably lead him to believe that he is in danger of being killed or of great bodily harm, and he so believes, and through nervousness, fear, fright or cowardice fatally shoots his assailant, it reasonably appearing to him that he can

defend himself in no other way, the homicide is justifiable as in self-defense.

*The charge—Respondent given full benefit of claim that shooting was caused by fear, fright, nervousness and cowardice—*The evidence in this case called for a charge, which was given, relative to murder in both degrees, to manslaughter and to justifiable homicide, and the aspects of the case favorable to the respondent, growing out of testimony in relation to fear, fright, nervousness and cowardice, were fairly presented in appropriate portions of the charge reviewed in the opinion.

*Mutual combat—First blow—Charge favorable to the respondent—*In the circumstances of this case which the evidence tended to show, an instruction that in a case of homicide in mutual combat, the question of which party gave the first blow is not important to the character of the homicide, was favorable to the respondent.

*Mutual combat—Use of illustration as to what would constitute murder—*Circumstances which the evidence tended to show made it appropriate for the court, in considering an agreement for a mutual combat, to say to the jury by way of illustration, that if a man draw his sword before the other has attempted to draw his and thrust his antagonist through the body whereby he dies, it is murder, for it shows the purpose of killing in the first instance.

*Illustration—Not to be inferred that illustration covers entire case—*From the use of this illustration the jury had no right to understand that elements not involved in the illustration were excluded from their consideration if they found such elements to exist.

*Instruction not applicable to any evidence need not be given—Abstract questions—*An instruction, relative to a case in which one of the parties to a mutual combat gives notice of his desire to withdraw from the combat and endeavors to decline any further struggle, was not required by any evidence in this case.

*Mutual combat—Murderous intent at outset—Change of intent after affray begun—*In an instruction which stated the law applicable to the case, if the jury found that the respondent entered upon the affray with murderous intent, the respondent was fully protected when the instruction permitted the jury to consider whether his design was altered during the affray before the homicide, and to determine the character of the homicide, in accordance with such altered design.

*Question of superior strength in connection with use of revolver—*It was not error not to refer to the question of the superior strength and health of the one, and of disease and weakness of the other, in that part of the charge which referred to the use of a revolver by the respondent.

Charge—References to testimony fairly made—Questions of fact left to the jury—

A full review of the charge shows that the references to the testimony were fairly made, and that all questions of fact were left to the jury.

New trial—Newly discovered evidence of insanity—Evidence must generate a

*doubt of guilt—*A petition for a new trial, brought by the respondent, on the ground of newly discovered evidence of insanity, was dismissed for the reason that the evidence in its support, taken in connection with the rest of the testimony, was not calculated to generate in the minds of a jury a reasonable doubt of the respondent's guilt.

*Defense of insanity—Measure and burden of proof—*The doctrine is recognized that a reasonable doubt of guilt, produced in the minds of the jury by evidence of insanity, entitles the respondent to acquittal.

INDICTMENT for murder in two counts. Trial by jury, Washington County, September Term, 1899, *Watson*, J., presiding. Verdict, guilty of murder in the first degree. The respondent excepted. Cause passed to the Supreme Court before judgment and sentence.

The evidence introduced on the part of the State, tended to show that one, Frederick Murphy, and the respondent, at the time of the shooting referred to, and for some time previous, were workmen on the Bolton Falls dam, and were boarders at the house of one, J. E. Pixley, in Waterbury, in the County of Washington; that ill blood had arisen between Murphy and the respondent; that the respondent had made threats concerning Murphy and that, a few days previous to the shooting in question, there was trouble and sharp words over a newspaper in connection with Murphy's going to the room of the respondent after it. The evidence of the State further tended to show that on the night previous to the shooting, the respondent went to Waterbury and purchased a thirty-two calibre revolver and a box of cartridges, and that on the night of the shooting, the respondent and Murphy came up towards the house of the said Pixley, nearly together, and that as they reached the house the respondent said to Murphy, in effect, "We may as well settle this difference, now as any other time," and that in reply, Murphy said, "All

right," that thereupon the respondent said, "Come into the barn," and started towards the barn, and that Murphy took off his coat and sweater and started towards the barn. Testimony introduced on the part of the respondent tended to show that Murphy first suggested settling the difference by saying just before they reached the house, as before mentioned, "We might as well settle this difference," and that the remark of the respondent above stated was in response to this. While there was some dispute as to who first suggested a settlement, it appeared from the evidence that the respondent and Murphy, then and there, in effect, agreed to settle the difficulty between them in mutual combat.

The State having been permitted to show, upon the question of premeditation, that the respondent purchased a revolver on the night before he shot Murphy, and the claim of the defense being that the revolver was got simply as a proper precaution, under all the circumstances surrounding the respondent, and with no purpose to use it on Murphy or any one else, except in proper protection of life and limb, and the respondent, having testified to that effect, and that he had a revolver about five months before, but that, it being worthless, he had thrown it away, the defense offered to show by one Burnham, that the respondent had had a revolver as he had testified. The testimony offered was excluded on the ground of remoteness. This evidence was offered in corroboration of the respondent's testimony that he had had a revolver about five months before, and also to show that it was nothing new for him to have one, under the claim that it bore on the question of premeditation. It appeared that this revolver was an old and rusty one, and that the respondent threw it away the fall before the shooting in question. No claim was made that the respondent had any revolver at a later time, until he bought the one with which he killed Murphy.

The respondent was permitted to give evidence tending to show that, on the morning of the day preceding the shooting, and before the purchase of the revolver, he had been told that Murphy and a certain colored man had made a plot to "fix" the

respondent. There was, however, no evidence of such plot. The defense claimed that the purchase of the revolver was a precautionary measure on the respondent's part to protect himself against assault by Murphy and the colored man, or by any one else, and offered to show threats of the colored man to "lick" the respondent. The offer did not indicate when the claimed threats were made and the evidence thus offered was excluded.

It appeared that when Murphy and the respondent agreed to settle the difficulties between them in mutual combat, as above recited, they were at or near the veranda of the house of the said Pixley, and that there was a barn some thirty feet away, and the evidence on the part of the State tended to show that, when the respondent went toward the barn, as stated, he went with a quick walk, and went into the door of the barn; that Murphy, after he had taken off his coat and sweater, walked quite slowly towards the barn; that the respondent, as he went into the barn, stepped back of a door that was closed, turned and faced out to see if Murphy was coming, and put his hand into his hip pocket and drew a revolver up in sight from his hip pocket; that the boarding-house keeper, Pixley, seeing this, spoke to Murphy and said, "Fred, what is the trouble here?" that Murphy answered, "Oh, not much," and that Pixley then said to Murphy, "Stop, don't go in there; you will get hurt;" that thereupon Murphy stopped and turned his head to the right, and that as he did so, the respondent came out of the barn quite smartly, went up to Murphy and raised from his hip pocket a revolver, that Murphy then swung to the right and ducked his head very low; and that as he did so, the respondent lowered the hand which held the revolver and fired; that when the shot was fired, the two men were near enough together to reach each other with their hands; that when the respondent fired, he said to Murphy, "I have got you now," or something to that effect; that Murphy was not armed with any dangerous weapon and did not know that the respondent was; that when the shooting took

place Murphy was nearer to the house veranda than he was to the barn, which was about thirty feet from the veranda.

The respondent's evidence tended to show that he had not been well for a time, though able to work; that he was not as large, healthy or strong as Murphy; that he went to the barn for safety, because he was scared when he saw Murphy commence to take off his garments; that he was in the barn a few seconds, and that then seeing Murphy coming towards the barn he came out of the barn, and was then so scared and nervous that he shot Murphy. The evidence of the State tended to show that the respondent was not scared, nor nervous, and that some days before the shooting the respondent said that "he thought he could lick Murphy yet;" that "Murphy was no good," and that "he had no sand in him." It appeared that Murphy was shot on the 18th day of February, 1899, and that he died in a hospital at Burlington, April 1st, 1899. The evidence of the State tended to show that he died in consequence of the shot fired by the respondent.

Dr. John B. Wheeler, who was a physician in charge of Murphy at the hospital in Burlington, testified in behalf of the State as to the facts within his own knowledge, and also as a medical expert. After stating his observation of Murphy and his medical treatment of him, and the results of his autopsy upon the body of Murphy after his death, he gave the following testimony:

Q. "Well, Doctor, assume that this person, on whom you performed the autopsy on the 1st day of April, on the 18th day of February was shot in the left side, at the point where the external wound appeared, with a bullet, 32-calibre bullet, and that the wound, which you have described, was made by that, taking that into consideration, taking into consideration your observation during your care of the dead man, taking into consideration the results of your observation at the autopsy that you have testified to, what, in your opinion, was the cause of the death of Fred Murphy?"

A. I think the cause of his death, or my opinion is that the cause of his death was septic poisoning, the result of the bullet wound.

Q. Was this a natural result of the wound?

A. Yes.

Q. Assume, Doctor, if you please, that this person received, on the 18th of February, a bullet wound, caused by a 32-calibre bullet, and that the wound you discovered was the result of that shot inflicted at that time, take into consideration the observation which you had of him, during your care of him, as you have testified to-day, take into consideration what you observed at the autopsy, as you have testified to-day, what do you say as to whether there was any other cause which contributed to the death of Fred Murphy, except such as would naturally follow from the bullet wound so inflicted on the 18th of February?

A. I say there was no other cause."

This testimony was seasonably objected to.

The charge of the court related to murder in the first degree, to murder in the second degree, to manslaughter and to justifiable homicide. Exceptions were taken to the charge, which, together with the portions of the charge excepted to, sufficiently appear from the opinion.

A petition for a new trial, on the ground of newly discovered evidence, was heard in connection with the hearing on the exceptions.

Richard A. Hoar, State's Attorney, for the State.

Frank Plumley and *Edward H. Deavitt* for the respondent.

Taft, C. J. I. Testimony was introduced upon the part of the State tending to show that the respondent, the night before the homicide, went to Waterbury and purchased a revolver and cartridges as tending to show the homicide was premeditated. This was legitimate testimony, for any fact "which constitutes a preparation for an act" is relevant, Steph. Dig. of Ev. (2nd

Am. Ed.) 19, and tends to show premeditation. The respondent testified he bought the revolver and cartridges to defend himself in proper protection of life and limb; that when he went on the job in the fall of 1898, five months before, he had a worthless revolver which he threw away some time thereafter. The respondent offered to show by one Burnham that he, the respondent, had a revolver when he went on the job the fall before, to corroborate his own testimony and to show that it was nothing new for him to have one, as bearing on the question of premeditation. It was not proper to corroborate his testimony, for, having a worthless revolver without cartridges five months before was not relevant to his having procured a new serviceable one with cartridges the day before the homicide. No more so than to show he had a battle-axe or scimitar. His testimony in that respect being immaterial, corroboration of it was properly denied. The fact that he had a worthless revolver which he threw away, did not tend to show it "was nothing new for him to have one" and for that purpose it was legitimately excluded. Had the testimony the tendency claimed for it by the respondent, the court excluded it upon the ground that it was too remote from the transaction. Questions of remoteness in such instances will not ordinarily be revised but left to the trial court. *Dover v. Winchester*, 70 Vt. 418; Steph. Dig. of Ev. (2nd Am. Ed.) 6. There is no occasion to revise the question of remoteness in this case.

II. The prosecution claimed that the respondent purchased the revolver with the intent to use it upon Murphy. The respondent testified he purchased it as "a precautionary measure to protect himself against assault by Murphy and the colored man, or of anyone else." There was a colored man at work upon the job with Murphy and the respondent.

The respondent, for the purpose of showing that he did not buy the revolver particularly for Murphy, but for the general purpose of self-protection against the colored man as well as against Murphy and others, offered testimony which was ex-

cluded under exception, tending to show that the colored man had told the respondent that he (the colored man) would lick the respondent. This was offered as bearing upon the intent with which he purchased the pistol.

There was no offer to show the time when the threat of the colored man to lick him was made. It was relevant, if at all, only if made before the purchase of the revolver, and as there was no offer to show that it was before, there was no error in rejecting the testimony. Whether relevant or not we do not decide.

III. Two exceptions were taken to the testimony of Dr. Wheeler, a surgeon, who testified as a medical expert. The question put to him was an hypothetical one. He was directed to assume certain facts, which the testimony tended to show, and to consider such facts as were disclosed by the autopsy, which he himself had made, and also his observations at the autopsy, to all which he had testified, and was asked what in his opinion caused Murphy's death. His answer was, septic poisoning, the result of the wound.

A similar hypothetical question, if there was any other cause which contributed to his death, was put, and he answered in the negative. (a) One objection made to the last question was that, "It had not been submitted to the respondent's counsel for consideration before it was asked." The counsel contended they should have had an opportunity to examine the question in order to ascertain whether there were other objections to be urged against it. It does not appear from the record that there was any other objection than the one taken, hereinafter noted, nor that any other objection can now be made. Unless it is shown that there was an objection to the question that could have been taken, had the counsel had the opportunity to have inspected it, the respondent was not harmed by the denial of the claimed right to consider the question before it was asked. For this reason there was no error. But counsel have no legal right to examine a question before it is put. The party loses nothing

by such a rule, for while no question can be made in this court that was not raised below, exception can be taken to any part of a question, or of the testimony contained in the answer, and if the exception is a valid one, the right of the party can thus be maintained.

Any other practice would tend to retard the progress of the trial, for much time might be spent over a question and the witness answer he knew nothing on the subject. Questions are often stated to the court, so that the jury cannot hear them, and it is generally required in case the defendant's counsel ask that it be so done. But it is not a legal right, denial of which is error. (b) The objection made to both questions was that they did not involve all the facts in the case and were lacking a portion of its clinical history. This was not a valid objection to the questions nor the answers. The opinion of an expert witness may be taken based upon a portion of the testimony in a case. The more testimony embraced in an hypothetical question the more valuable the testimony may be, depending upon the circumstances. But the testimony is legitimate based upon part of it. The cases often cited upon this point are: *Gilman v. Strafford*, 50 Vt. 723; *State v. Hayden*, 51 Vt. 296; *State v. Woodbury*, 67 Vt. 602. In *Gilman v. Strafford* the question did not arise, *State v. Hayden* was decided upon the authority of the *Gilman* case, and in *State v. Woodbury* the question was correctly decided without the citation of authority.

IV. Many exceptions were taken to the charge and have been argued by counsel. The respondent insists there was error in respect to what the court said upon the subject of the respondent's testimony in regard to his intention of shooting Murphy. In that part of the charge relating to murder in the first degree, the court properly charged with reference to the intention of the respondent in regard to the homicide of Murphy and called the attention of the jurors to the fact that the respondent had testified he had no intent to kill Murphy before he went to the barn, and that he had no such intent when he was in the barn; that he had

testified to that, but had said nothing with reference to what intent he had after he went out of the barn. The jurors were told that if he had no intent to kill Murphy before he went out of the barn, there was time for him to form that determination between that time and the time of the shooting. And that if he did so form it after he went out of the barn that it was, within the meaning of the law, premeditated.

It is insisted that the jury should have been told in this connection what the claim of the respondent was in respect to his intention after he had gone out of the barn. There was no error in the charge so far as the court went in disposing of that question when speaking of the homicide in respect to whether it was murder in the first degree or not. And what the counsel insist should have been said to the jury at this time, was stated to the jury distinctly and accurately in that part of the charge in which it was material in respect to reducing the crime to manslaughter, whether it was premeditated or not, and whether he did form an intent after he went out of the barn to shoot him. They were told to consider all the evidence in respect to it in determining that question, and the jury were told that they must take into consideration all that the respondent said which bore upon his intention in regard to the shooting of Murphy, and that they should take it as they remembered it, and not as the court stated it to them, so that the respondent had the full benefit of the instruction in respect to premeditation when the court charged upon the subject of manslaughter. The jury were told that if the shooting of Murphy was the result of the fear, fright, nervousness, or terror that seized the respondent, after he went out of the barn, it was manslaughter and not murder.

What the judge said was by way of comment in respect to a feature of the case which, if true, was quite significant. The question was with what intent did the respondent shoot Murphy. He went on the stand as a witness, and in response to questions of his counsel, said he had no intent to shoot Murphy when he went into the barn, nor when he was in the barn, but did not

testify what his intent was when he did go out of the barn. His failure to testify upon this point was a circumstance for the jury to consider, for if he had no intent to shoot him when he went out of the barn, it would have been very natural for him to have followed his denial of an intent to shoot him when he went into the barn, and when he was in the barn—with a like denial of an intent when he went out, and until the time of the shooting. From his failure to do so, the jury might properly infer he went out of the barn with the intent to shoot him. It is true his testimony tended to show that after he went out of the barn he was so frightened that he then shot him, but he did not say he had no such intent after he went out of the barn and prior to the shooting, although it might be inferred from what he did say. It was an argumentative way of stating that until he shot, when overcome with fear, he had no intent to kill Murphy. It is argued that as “the court gave an explanation of the respondent’s evidence unfavorable to him, the court should also have given an explanation favorable to the respondent.” This is not a just criticism of the charge. The court did not state the testimony in detail in any respect. The jury were told to consider the previous conduct of the respondent and Murphy toward each other, without stating what that conduct was, also what was said by the respondent to Murphy about settling the matter, or if Murphy spoke first, what was said about it,—the manner in which each conducted himself, etc. The jury were told that the presumption was that the killing was without malice, and that that presumption, with the general presumption of innocence, was to be weighed in the respondent’s favor and must be overcome by the evidence of the State, and the killing must not be the result of some sudden heat of passion, etc. Upon this question of premeditation the court made no reference to the damaging character of the testimony of the respondent, save to the fact that he had not testified what his intent was when he went out of the barn, and this, we have said, was proper.

His claim was that he had no intent to shoot until he was so overcome with fear and terror that he feared immediate great bodily harm, etc., but the court made no reference in its charge to the most damaging features of the testimony, e. g., his statement to Murphy the day of the shooting that he (Murphy) had better try to do him, if he thought he could, thus placing the symbolical chip upon his shoulder and daring Murphy to knock it off; that "he would fire Murphy down stairs if he caught him in his room again"—that "he thought he could lick Murphy yet"—that "Murphy was no good", and that "he had no sand in him", that he met Murphy more than half way between the barn and the house and that when he shot him he said "I have got you now"; all this when the respondent was armed and Murphy was not—testimony that hardly tended to support the respondent's theory that he was in great fear of Murphy—still none of this testimony was called specifically to the attention of the jury by the court. The explanation of the testimony by the court was as favorable to the respondent as unfavorable, and this exception of the respondent is not sustained.

It is further claimed that the court did not give due consideration to the testimony showing fright, fear, nervousness and cowardice. The charge on the subject of manslaughter was full and accurate and the court said to the jury that if the drawing of the revolver and the use of it was an afterthought subsequent to the encounter, wholly due to the then nervous excitement, fear, anger and heat of blood of the respondent, the case would be one of manslaughter and not of murder, unless justifiable, in self-defense. But if such elements were without such provocation as the law regards as sufficient justification for anger and heat of blood, the killing would be murder and not manslaughter. That is, the charge placed the elements of fear, fright, nervousness and cowardice on the same plane with anger and heat of blood. There is no other rule, and we fail to see wherein the trial judge erred in respect to the rule as applicable to a case of sudden fright, fear, terror and nervousness. The jury were

plainly told that if the drawing and use of the revolver was an afterthought subsequent to the encounter and wholly due to the then nervousness, excitement, fear, anger and heat of blood of the respondent, the offense was manslaughter and not murder. If, as the respondent's testimony tended to show, he went into the barn for safety, thinking Murphy would go away, when he saw Murphy removing his outer garments and start towards him and he judged from his (Murphy's) hostile attitude that he intended him, the respondent, great bodily harm, and he then through fear, nervousness, excitement, fright, etc., shot Murphy, it reasonably appearing that it seemed to him he could defend himself in no other way, the circumstances would present a case of justifiable homicide, one of self-defense. It is argued that when the respondent saw Murphy going towards him, and apprehending he would do him great bodily harm, he was seized with fear, terror, excitement, fright and nervousness and that he then shot Murphy. Such facts presented a case of self-defense and required appropriate instructions upon that subject, and it will be seen by reference to the charge that the instructions were full, adequate and complete in that respect, and of such a character, that of them, the respondent does not complain. It is claimed by the respondent that he had no design to kill Murphy, but that when he went out of the barn he was confronted by the deceased and so overcome with fear, nervousness, fright and terror that as a result he shot Murphy in self-defense, and the counsel argue that on this theory the respondent had a right to do what was necessary to make his defense effective, and although it might not have been necessary to have killed Murphy, if in view of his fear, fright, nervousness or cowardice, it reasonably seemed so to him, he could not be convicted of murder. Many cases were cited upon this question, namely: *State v. Carr*, 58 Vt. 483; *Grainger v. The State*, 5 Yerg. (Tenn) 459, and many citations from the text-books. The gist of the rule in respect to this matter is well stated in all of the cases so far as we observe. It is not whether the necessity actu-

ally existed, but whether in fact it reasonably seemed so to the respondent, under all the circumstances of the case, and the rule was properly stated by the trial judge in the respect mentioned, for the court said that "If the circumstances were such as reasonably to lead the respondent to think that he was in danger of being killed or of great bodily harm by an assault from Murphy, he had a right to defend himself, etc." And later the jury were told that "the amount of force that he (the respondent) had a right to use depended to some extent upon the peril that he had reason to believe he was in at the time. * * * * He had to judge of the danger he was in from the circumstances that surrounded him, and if it reasonably appeared to him under all the circumstances that he could protect himself in no other way except by killing Murphy, and if then Murphy started to kill him or do him great bodily harm, he would have a right to defend himself under the circumstances in that way." This question was stated accurately and fully by the trial judge and the claimed error is that the jury were not told that the crime of manslaughter was distinct from murder so that the jury might have understood that if the defendant was in fault at all in acting unreasonably under the circumstances, the jury should find him guilty of murder when they should properly find him guilty of manslaughter only, and that this injustice arose from the failure of the court to state the question consistently with the theory of manslaughter,—the lesser crime. But the theory of the case as claimed by the respondent in respect to manslaughter had already been fully stated by the trial judge, and it is not probable the jury could get a wrong conception of the rules in respect to the several degrees of crime when they were so accurately and fairly stated by the court. The respondent had the benefit of having the testimony considered under a full knowledge of the law as to the essential characteristics of each kind and degree of crime with which the respondent was charged under the indictment. The court did not state that the respondent could not be convicted of manslaughter nor of anything less than murder. This

assumption of what the court stated is not correct. The court left the jury to consider whether the offense was murder in the first or second degree, manslaughter, or justifiable homicide. The fact is, these questions were all presented to the jury and the question of self-defense was fully and fairly stated to them. Two full pages of the printed case contain nothing but the instructions in regard to whether the homicide was justifiable, whether the killing was in self-defense, and so far as we can see, it accurately, fairly and fully met every phase of the case. The criticisms of counsel taken in their brief in respect to the charge, place it almost wholly upon the ground that the jury might have misunderstood facts in reference to the transaction and the law as applicable thereto. For instance, it is argued that from the language of the charge, the jury might well understand that the respondent was not justified under any circumstances in going out of the barn. It is clear that one is not warranted in taking this view of the case. No jury could have that impression from the whole of the charge nor from any part of it. They were at liberty to find from the language of the instructions that if the respondent was at fault in coming out of the barn, but that the shooting resulted from fear, fright, terror and nervousness, or his seeming situation as it reasonably appeared to him at the time, he was not guilty of murder, in either degree, and it is fair to say that the jury must have followed these instructions. The instruction given the jury in respect to the offense, if the affray was entered upon by the respondent under such circumstances that the killing would be murder, fully protected him in respect to any change in his situation during the affray, by permitting the jury to determine that if his design in respect to the affray altered, it became merely a case of manslaughter or self-defense; the respondent had the benefit of it and the court did not err in that respect. The court charged that, "Though the right to take life in self-defense is unquestionable, one on whom another unarmed is making mere threats and going towards in his ordinary manner of walking must not instantly shoot him, and if he

does thus needlessly kill the other who, unarmed, is only making threats and thus going towards him, it would be murder." Claim is not made that this is an erroneous instruction, but it is insisted that the jury should have had an opportunity to judge for themselves whether the acts of Murphy amounted to an overt act or hostile demonstration. The court did not take from the jury the right to determine the nature and character of the acts of Murphy, whether overt or not, nor did the court state that there was no overt act of injuring the respondent on the part of Murphy, for in one part of the charge the court stated the case saying that, "If the jury find that Murphy went along behind in his usual way of walking without any overt act of injuring the respondent, excepting taking off his coat and going towards the barn, and that when about half way between the house and barn he did or did not stop when spoken to by Mr. Pixley, and told not to go into the barn for he would get hurt, the respondent would have no right to rush out of the barn revolver in hand, draw near to Murphy and then and there kill him, unless the circumstances were such as to reasonably lead the respondent to think that Murphy was about to kill him or do him great bodily harm and that the respondent could protect himself in no other way." The statement of this rule was correct and such as required by the testimony in the case. There is no statement on the part of the court that there was no overt act on the part of Murphy to injure the respondent. Whether there was any overt act on the part of Murphy to injure the respondent was expressly left to the jury. This is shown by the following abstract from the charge.

"It is claimed on behalf of the respondent that the taking off his coat by Murphy and going toward the respondent at the barn, as the evidence tends to show, was such an overt act as to create in the mind of the respondent an hostile demonstration by Murphy of such a character as to impress upon him the imminence of danger of loss of his life or of great bodily harm. You will take into consideration all the evidence bearing thereon, and

say whether what Murphy then and there did was such an overt act as to reasonably impress the respondent in that way, and if it was, you will consider such threats as evidence bearing upon the question of self-defense, and give the evidence such weight as you deem it entitled to. But if you find that what Murphy then did was not such an overt act, then such prior threats made by Murphy would have no force in favor of the respondent in support of his plea of self-defense."

That the question of overt acts on the part of Murphy was left to the jury is also seen from the very close of the charge—the last thing said to them, viz :

"In referring to what took place when the respondent and Murphy went on the piazza, and in substance, agreeing to go out and settle the matter, or had a talk about it, I stated one or both of them took off their coat or outside jacket. It is suggested that the evidence tends to show that Murphy took off a coat and sweater. Well, you will remember the evidence, gentlemen, and in that regard you will take it as you remember it. And you will take into consideration, at the same time, the actions of Murphy, so far as they were perceptible to—seen by the respondent, in determining whether there was an overt act within the definition that I have given you, a demonstration of that nature on the part of Murphy toward the respondent."

The testimony tended to show that Murphy took off his coat and sweater and started towards the barn after he and the respondent had agreed to settle the difficulty between them by fighting, and the court stated all the facts in reference to Murphy's conduct which the testimony tended to show. The claim that the jury should have been told that "if the assaulting parties talked together before the homicide was commenced and one gave notice of his desire to withdraw from the combat, and really and in good faith endeavored to decline any further struggle and the homicide was necessary to save him from great bodily harm, it might be excusable," was not required under the state of the testimony for there was nothing in the testimony

that indicated or tended to show any desire on the part of the respondent to withdraw from the combat and that he had really and in good faith declined any further struggle, but the testimony tended to show the reverse. It was an abstract question and the court was not required to give any instructions upon it.

There are two further objections made to the charge: one is to the language in regard to the case of mutual combat, when the court said: "That it was not important to the character of the killing in cases of mutual combat which party gives the first blow." This was favorable to the respondent inasmuch as it gave the jury liberty to acquit him although he gave the first blow; and the court had a right to state the rule that if a man draw his sword before the other has attempted to draw his and thrust his antagonist through the body, whereby he dies, it is murder, for it shows the purpose of killing in the first instance. This instruction was peculiarly proper. The testimony tended to show that Murphy was unarmed, that the respondent was armed, and it is evident that the respondent knew that Murphy was not armed, that they had agreed to go to the barn or the vicinity and settle the matter, as they phrased it, in an encounter. This being so and before they had any opportunity to engage in mutual combat without anything on the part of the respondent to show that he intended to retire from the combat, if he with his fire-arm, knowing that Murphy had none, shot him through the body whereby he died, it was murder for it showed the purpose of killing in the first instance. This instruction was required, and although there might have been in the case other elements which characterized the shooting, the jury had no right to understand that these other elements had nothing to do with the degree of criminality of the shooting. The jury may have found there were no other elements in regard to it, but simply the fact that the respondent armed himself, knowing that the deceased was unarmed, and then at the very first point of the encounter shot him. This would require the instruction

given. Neither was it error not to state the questions of superior strength and health of one and disease and weakness of the other in that part of the charge which referred to the use of the revolver by the respondent. There were no instructions given to the jury in regard to the testimony which were erroneous. The testimony in the case required full and accurate instructions in regard to the character of all degrees of the crime,—murder of both degrees, manslaughter, and justifiable homicide, and the court fully complied with all these requirements, and we are unable to find error in any part of the charge.

Upon inspection of the record the court are of opinion that judgment ought to be rendered upon the verdict, and it is so rendered and sentence and execution thereof ordered.

V. The respondent has brought a petition for a new trial upon the ground that since the former trial he has discovered testimony to show that he was not guilty by reason of insanity. He supports his petition by the depositions of nine witnesses, who appear to be reputable persons, many of them town officers, residing in South Berwick, Maine, and that vicinity. The substance of all the depositions is that the respondent was odd, peculiar, not talkative,—that at times he would be suspicious, imagining there were parties ready, as one witness phrased it, “to do him up,” morose, and sullen, but was not vicious, while at other times he would be talkative, companionable, genial and cheerful. Testimony tends to show that at times he was somewhat troubled from having become a Congregationalist, or attended the Congregational church when he was formerly a Catholic. The testimony tends to show that he complained of having been wrongfully listed in South Berwick, but at the time he made the complaints in respect thereto, he was drunk and there is nothing in the testimony tending to show that he was not wrongfully listed there. One witness says that he would only say “Hello” when persons spoke to him. This is the substance of the testimony which it is claimed has been newly discovered. One witness says that he was satisfied in his own mind that the respondent

was not right mentally; another one, that he thinks the respondent must have been insane to shoot anyone, while two pronounce him insane in their opinion. One says that he is not capable of judging whether Doherty was sane or insane; one says that he cannot call him insane and three of the witnesses state that the thought that he was insane never occurred to them at the time when they were noticing his oddities and peculiarities.

It is hardly necessary to speak of the question whether the respondent or his counsel were in fault or negligent in not making the discovery of this testimony before the trial, for the reason that the testimony taken as a whole does not convince us that a different result would be reached upon a new trial. We have scanned it very carefully. We do not require it to be of such a character that it would convince a jury, by any rule of evidence, that the respondent was insane. But it must be of sufficient force taken in connection with all the rest of the testimony in the case to generate or create a doubt in the mind of the jurors of the party's guilt. The burden is not upon him to establish his insanity, but if the testimony that it is claimed has been newly discovered is of such a character as to leave a reasonable doubt of the respondent's guilt when taken in connection with all the rest of the testimony, it would be sufficient and we should grant him a new trial. But the character of it is such that we do not take this view of it and are of opinion that in case of another trial the result would be the same as the last.

The petition is therefore dismissed.

RUTLAND RAILROAD COMPANY v. GEORGE T. CHAFFEE ET AL.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and
WATSON, JJ.

Opinion filed August 29, 1900.

Railroads—Estate of railroad company in land taken by right of eminent domain—The right of a railroad company in land taken by it in the exercise of the right of eminent domain is something more than a mere easement. The railroad company is seised and possessed of such an estate in the land as is necessary to its uses.

Betterments—Right as to betterments not affected by constructive notice—That land upon which betterments have been made had been taken by a railroad company in the exercise of the right of eminent domain, does not affect the question of notice to the one making the betterments. The right to recover for betterments depends upon the supposition of the one making them that he purchased the title in fee, and his right is not affected by constructive notice.

In contemplation of the betterment statute structures on right of way of railroad not necessarily nuisances—It cannot be said that, in contemplation of the betterment statute, buildings and other structures erected on a railroad company's right of way are nuisances and not improvements.

Judgment for betterments on railroad company's right of way—In an action of ejectment by a railroad company to recover the seisin and possession of lands constituting a portion of its right of way taken by it in the exercise of the right of eminent domain, the defendant may under a proper declaration recover judgment against the company for betterments upon such lands, under the rule of damages provided by V. S. 1500.

Execution on judgment for betterments—Right of way of railroad cannot be levied on—Upon a judgment for betterments obtained in an action of ejectment execution can issue only against the lands recovered in such action, and land used by a railroad company as its right of way cannot be levied on to satisfy such execution.

Judgment for betterments on right of way of railroad—Judgment creditor must resort to equity—One who, under a proper declaration in an action of ejectment, has recovered judgment against a railroad company for betterments upon its right of way, not being permitted to enforce his judgment in the ordinary manner, is left to his remedy at equity, which may appropriately be by way of an injunction restraining the

railroad company from using the lands in question until the judgment for betterments is paid.

Equitable jurisdiction—Remedy at law inadequate—The rule—When the law gives a person a full legal right, without a full, ample and complete remedy at law, equity has jurisdiction to afford relief.

ACTION OF EJECTMENT. The plaintiff recovered final judgment for the seisin and possession of the demanded premises at the October Term, 1898, of the Supreme Court. After the rendition of that judgment the defendants, with leave of court, filed a declaration against the plaintiff for betterments, and the case was remanded and issue joined on that declaration. Trial by jury, Rutland County, March Term, 1900, *Rowell*, J., presiding. It appeared from the opening statement of the defendant's counsel that the demanded premises were a part of the plaintiff's right of way for its railroad, taken and acquired by the exercise of its right of eminent domain and not otherwise; whereupon the plaintiff objected that, that being so, no recovery for betterments could be had. The court so ruled *pro forma* and directed a verdict for the plaintiff accordingly, and rendered judgment thereon. The defendants excepted.

W. W. Stickney and *J. G. Sargent* for the plaintiff.

Butler & Moloney and *J. C. Baker* for the defendants.

TAFT, C. J. The plaintiff in this case brought an action of ejectment against the defendants to recover the seisin and possession of a strip of land along the margin and a part of their road-bed in the City of Rutland. The defendants had erected buildings upon the land and for many years occupied them as store houses for the reception, storage and delivery of freight sent by and to them upon the plaintiff's railroad.

The plaintiff recovered judgment in the Supreme Court, (see 71 Vt. 84,) and at that term the defendants filed a declaration for betterments, and the cause was remanded to the County Court for trial. Upon trial in the court below it appeared that the demanded premises were a part of the plaintiff's right of

way for its railroad taken and acquired in the exercise of eminent domain, whereupon, the plaintiff claimed that no recovery for betterments could be had; the court *pro forma* so ruled and directed a verdict for the plaintiff, and rendered judgment thereon, to which the defendants excepted and the cause comes to this court upon said ruling. According to sec. 1500 V. S., "After final judgment for the plaintiff in an action of ejectment, if the defendant has purchased the land recovered in such action or taken a lease thereof, supposing at the time the title to be good in fee or such lease to convey the title and interest therein expressed, such defendant shall recover of the plaintiff the full value of the improvements made upon the land by him or by those under whom he claims and the increase in the value of the land in consequence of the betterments so made shall be held to be the value of such betterments." By sec. 1502 V. S., the court is empowered to stay proceedings in the ejectment suit and the land so recovered shall be held to respond to any judgment rendered for the defendants in the action upon their declaration for betterments and by sec. 1505 V. S., execution on such judgment shall issue only against lands so recovered in the action of ejectment. It is urged by the plaintiff that their right of way cannot be held to respond to a judgment rendered on a declaration for betterments nor execution be levied upon a railroad's right of way for the reason that neither the creditor nor the purchaser at execution sale has any franchise to make use of the same, and that the right of way cannot be used apart from the franchise, and that the franchise cannot be enjoyed without the right of way.

This is undoubtedly true, so far as the levy of an execution upon the land is concerned. It cannot be levied upon for the reason alleged, and for the further reason, that the statute referred to prohibits it.

It is claimed that no recovery can be had for betterments imposed on a railroad company's right of way which was acquired by the exercise of its power of eminent domain and not otherwise;

that its right is an incorporeal hereditament in the nature of an easement; that the recovery can be had only against the rightful owner of the land and not one having an easement therein. The right of the railroad company is something more than a mere easement: it is seised and possessed of the land under the statute, of such an estate as is necessary for its uses. It was settled in this case, 71 Vt. 84, that the plaintiff had such an estate in the land in question that ejectment would lie. Its estate is of such a nature that the statute relating to betterments is applicable. If ejectment can be maintained by the plaintiff the defendants may claim the benefits, if any, that they are entitled to under the betterment statute.

The plaintiff insists that the defendants could not make improvements on a railroad's right of way in this State, supposing their title to be good in fee for the reason that a railroad is of such a permanent character that whoever purchases land adjacent to its right of way after its construction must take notice of the rights of the company as shown by the filed location, construction, and operation of its road. That is, they are chargeable with constructive notice. But under our statute betterments made upon railroad lands stand no differently from those made upon the lands of private individuals. The question is one of fact whether when the defendants purchased the land, they supposed their title in fee was good. It is held in this State that constructive notice which the law implies from the registry of a deed is not sufficient to preclude one from recovering for betterments, who in fact purchased in good faith and with the supposition that he was obtaining a perfect title in fee. *Whitney v. Richardson*, 31 Vt. 300. It was held in *Kendall v. Tracy*, 64 Vt. 522, that defendants can not recover for betterments when they had actual knowledge of a mortgage resting upon the land, and it is said that the right of a party to betterments depends upon his *bona fide* supposition that he bought the land with title in fee. Neither can it be said as against this statute that buildings and structures erected upon a

railroad's right of way are nuisances and cannot be regarded in law as improvements.

The statute provides for a recovery for betterments and for a judgment in favor of the party making them for the damages sustained by him. The rule of damages is prescribed by the statute, viz., "the increase in the value of such land in consequence of betterments so made." Under its provisions a judgment may be obtained against the plaintiff in ejectment. Upon such judgment an execution can issue only against the land so recovered in the action. Having recovered a judgment for betterments, the defendant in the action of ejectment is confronted with this dilemma. He can have an execution only against the land recovered in the action, and the land being used by the railroad as its right of way, cannot be levied upon to satisfy the execution. The law gives to the party a judgment for the damages which he has suffered, but will not permit him to enforce the judgment in the ordinary way by execution.

When the law gives a person a legal right, without a full, ample, and complete remedy at law, equity has jurisdiction to afford the party relief, and it may do so in this case if the party is so advised.

It is analagous in principle to the ruling of the court in cases when a land-owner permits a railroad company to enter upon his land and construct its road, or stands by and sees the company do it, and makes no objection thereto, and no damages are paid him for such taking of his land; while the land-owner cannot maintain trespass nor ejectment because the land was entered upon by his license, nor assumpsit, perhaps, after two years have elapsed, or the corporation is insolvent, equity grants the party relief by perpetually enjoining the road from occupying the land until the damages are paid. In analogy with this principle, in this case the plaintiff can be perpetually enjoined from using the premises until it pays the defendants the judgment, if any is obtained, for their betterments. There is nothing inconsistent in this. The land which is the subject of controversy cannot be taken, and

used by any other party than the plaintiff, and the defendants who are damaged by reason of their betterments can obtain relief in the manner indicated. A majority of the court direct,

The pro forma judgment is reversed and cause remanded.

A. S. MARTIN, LEONARD FLINT and EMILY EMORY v. I. B. PALMER.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed August 30, 1900.

*Bill in equity—Signature by orator's solicitor sufficient—*A signature by the orator's solicitor is a sufficient signature to a bill to foreclose a mortgage.

*Decree dismissing bill of foreclosure—Appeal without permission of court—V. S. 981—*Although no appeal can be taken from a decree for the foreclosure of a mortgage without permission of the court, an appeal from a decree dismissing a bill of foreclosure may be taken without such permission.

CHANCERY. Heard on bill and motion to dismiss, Orange County, December Term, 1899, *Munson*, Chancellor. Decree rendered dismissing the bill. The orator appealed. The appeal was filed as of course.

John W. Gordon for the orators.

R. M. Harvey for the defendant.

WATSON, J. The bill of complaint was brought to foreclose a mortgage, and it was signed by the orators' solicitor, but not by the orators. The defendant moved to dismiss the bill for that there was no signature of the orators thereto. The motion was granted, and the cause is here upon appeal therefrom.

The bill is usually drawn by the orators' solicitor, and he is responsible for its contents. If it contains matter criminal, im-

pertinent, or scandalous, such matter may be expunged, and the solicitor ordered to pay costs; and, from an early time, the general rule of practice has been imperative that the signature of counsel must be subscribed thereto.

It was declared by Lord Eldon that such signature of counsel is to be regarded as a security that, judging from written instructions laid before him of the case of the defendant as well as of the plaintiff, there appeared to him, at the time of framing the bill, good ground of suit. Mit. & Ty. Eq. Pl. & Pr. 145; 1 Dan. Ch. Pl. & Pr. 357. And so it is regarded under the chancery practice in this State (Chancery Rule 8), and in the Federal Courts. Equity Rule 24.

A party may sue in person and so be his own solicitor, in which event only, the practice requires that his signature be subscribed to the bill. 1 Hoff. Ch. Pr. 97.

The decree was not for the foreclosure of a mortgage, and, therefore, the orators could take an appeal without permission of the court therefor. V. S. 981.

Decree reversed, and cause remanded with mandate that the motion to dismiss be overruled, and bill adjudged sufficient.

STATE v. F. B. BROWN, APT.

May Term, 1900.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed August 30, 1900.

V. S. 4821—*Complaint for keeping dog not licensed according to law—Complaint insufficient on demurrer*—A complaint, the substance of which was that the respondent, on April 1 of a given year, kept a dog more than eight weeks old, not licensed according to law, was insufficient on demurrer.

Same—V. S. 4822—A complaint which, as amended, set out that the respondent, on June 1 of a given year, kept a dog more than eight weeks old, not licensed according to law, was insufficient on demurrer. The dog might have been brought from without the State within ten days of June 1, or it might have become eight weeks old within that period, and in either case it would have been lawfully unlicensed on June 1.

V. S. 4826—Complaint should state facts constituting the offense charged—A complaint should contain a statement of the facts and circumstances necessary to constitute the offense sought to be charged.

Grand juror's complaint not amendable in substance in appellate court—A grand juror's complaint is not, in the appellate court, amendable by the state's attorney in matter of substance.

APPEAL from the judgment of a justice on a town grand juror's complaint against the respondent for keeping a dog not licensed according to law. Heard on demurrer, Lamoille County, December Term, 1899, *Taft*, C. J., presiding. Pending the demurrer, the court, against the objection of the respondent, permitted the state's attorney to amend the complaint. Demurrer overruled and amended complaint adjudged sufficient. The respondent excepted, and the cause was passed to the Supreme Court before final judgment.

The original complaint charged, in substance, that the respondent at Belvidere in Lamoille County, on the first day of April, 1899, kept a dog, more than eight weeks old, not then and there registered, numbered, described and licensed according to law. By the amendment referred to, the date of the alleged unlawful keeping was changed from April 1, 1899, to June 1, 1899.

The amendment of V.S. 4821 by No. 97, Acts of 1900, may be noted.

L. J. Thompson, State's Attorney, for the State.

B. A. Hunt for the respondent.

WATSON, J. The owner or keeper of a dog more than eight weeks old shall annually cause it to be registered, numbered, described, and licensed on or before the first day of April, for

one year from that date, and pay for such license one dollar for each male or spayed female and four dollars for each female dog; and when not thus paid, the owner or keeper may procure a license on or before the fifteenth day of May, by paying two dollars for each male or spayed female and four dollars for each female dog. V. S. 4821. And if, after the fifteenth day of May, a person becomes the owner or keeper of a lawfully unlicensed dog, he may have such dog licensed within ten days after he becomes the owner or keeper. V. S. 4822.

The law contemplates that a license tax shall be paid on every dog more than eight weeks old which may be lawfully owned or kept, and the provisions of the latter section are applicable to dogs brought from without the State subsequent to the time when they could be licensed under the provisions of the former section, and to such as become more than eight weeks old after that time. In either case the owner or keeper has ten days in which to pay the tax, and within that time he is not keeping a dog contrary to the provisions of law referred to in V. S. 4826, upon which the complaint is based.

If the dog named in the complaint was lawfully unlicensed because brought from without the State within ten days prior to the first day of April, 1899, or because it was not more than eight weeks old until within that time, the respondent had all of that day in which to have it licensed, and he would not be guilty of keeping the dog contrary to law during the time.

The complaint does not contain a statement of the facts and circumstances necessary to constitute the offense sought to be charged, on the day therein named, and it was therefore insufficient before the amendment. 1 Bish. Cr. Pro. sec. 325. Nor is it sufficient as amended. Ten days may not have elapsed after the dog was first brought into the State, or after it was eight weeks old, and before the first day of June, 1899, without which the respondent would not be guilty of then keeping the dog contrary to law.

The complaint, being defective in substance, is not amendable. *State v. Wheeler*, 64 Vt. 569.

Judgment reversed, demurrer sustained, complaint adjudged insufficient and quashed.

IN RE BARRE WATER COMPANY.

January Term, 1900.

Present: ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed August 30, 1900.

*Eminent domain—Taking waters—Damages to owners of water powers—*The taking by a water company of water from one of two converging streams, without the abandonment of a previously acquired right to take water from the other, injures the owners of water powers below the point of confluence to the full extent of the additional right to take. *Same—Return of water in form of sewage—*The fact that waters diverted from a stream by a water company are, in the form of sewage, returned by the city to which they are furnished, to the stream from which they are taken above water powers affected by their diversion, cannot be taken into consideration in determining the damages to the owners of such powers by the diversion, the disposition of the sewage being wholly within the control of the city.

PETITION brought by the Barre Water Company to take waters in the exercise of the right of eminent domain. Heard on the report and supplemental report of commissioners, motions to set aside and re-commit the same and exceptions thereto, Washington County, March Term, 1898, *Munson*, J., presiding. Motion to set aside and re-commit and exceptions to reports overruled. Reports accepted, and judgment on reports for nominal damages to certain petitionees who excepted.

W. E. Barney for the petitioner.

W. A. Boyce and *Frank J. Martin* for the petitionees.

WATSON, J. Prior to the bringing of the petition in this case, the petitioner, the Barre Water Company, had the right to take water from Jail Branch, to the capacity of a 16-inch pipe, for the purpose of furnishing the Village (now City) of Barre and the inhabitants thereof, with water for the extinguishment of fires, and for sanitary, domestic, and other purposes. In 1888 it constructed a suitable dam or reservoir on that stream and laid a 16-inch main pipe therefrom to the then Village (now City) of Barre, and laid and constructed mains and service pipes in and about the village, sufficient to supply it and the inhabitants with water for the purposes above named, and has since, from time to time, extended the pipes as the public good and the convenience and necessity of individuals have required. Since that time the number of inhabitants of Barre has greatly increased, also the number of persons taking water from such supply, and the demand for public purposes. Since the reservoir was constructed, six mills with dams have been built above it on Jail Branch, and all the refuse and sewerage therefrom passes into the stream. About a mile or a mile and a half above the reservoir is the Village of East Barre with a population of several hundred inhabitants, nearly the entire growth of which has taken place since the construction of this water system, and the drainage therefrom is necessarily into the same stream. The commissioners find that, for these reasons, the waters of the stream have become and are unsuitable for domestic purposes, and that a new supply ought to be furnished by the petitioner.

It is proposed by the petitioner to take, under these proceedings, by an independent pipe, the waters of Scott Brook, and of Peck Pond Brook, both being tributaries of Steven's branch of Winooski river, and to construct a large reservoir at some point below Peck Pond, and a small one on Scott Brook from which to carry the water to the large reservoir, and lay a 12-inch pipe from there to the City of Barre to connect with the present mains.

Steven's Branch and Jail Branch converge at the upper end of the city and form one stream. The commissioners find that the waters proposed to be taken are suitable for domestic uses, and the reservoir so located as to afford proper and reasonable supply and facilities, both for domestic and fire purposes, for the present and the probable future needs of the city; that at times of low water, and of anchor ice in the stream, the supply from Jail Branch for fire purposes is liable to fail or become insufficient for the proper protection of the city; and they recommend that the petitioner be permitted to take the waters of Scott Brook and of Peck Pond Brook, as proposed in the petition, and convey the same through its reservoir to the City of Barre for the purposes named in its charter.

Prior to the hearing before the commissioners, the petitioner purchased and secured deeds of conveyance of the riparian rights of some of the land-owners, and the several sums awarded to the mill-owners above the confluence of Jail Branch and Steven's Branch, have been accepted and paid. The case therefore, stands in this court, upon exceptions by the owners of mills and water powers below the confluence.

The commissioners state that the new supply sought to be had is to be used as a substitute for the waters of Jail Branch, by reason whereof the owners of mills and water power below the confluence of the two branches, will not be materially affected, and therefore find for them to recover nominal damages only, with an alternative finding, in case the court should be of the opinion that damages should be awarded them upon the basis of an appropriation and actual taking and diversion of all the waters of Scott Brook and of Peck Pond Brook, irrespective of the fact that such taking would relieve Jail Branch to the extent of the quantity so taken. If, in fact, the right to take water from Jail Branch were to be permanently abandoned by the petitioner, a different question would be presented, and one upon which we now express no opinion. But the petitioner still retains the right to take water therefrom through the 16-inch pipe, and it is

not its purpose to abandon that privilege. Hence, the mill and power owners are injured to the full extent of the maximum capacity of the proposed 12-inch pipe,—the quantity of water that may be diverted,—and they should be awarded damages accordingly. *Leonard v. Rutland*, 66 Vt. 105; *Bailey v. Woburn*, 126 Mass. 416; *Howe v. Inhabitants of Weymouth*, 148 Mass. 605; *Hamor v. Water Co.*, 92 Me. 364.

Nor is the fact that a portion or all of the sewerage from the city is discharged into the stream above the property of the mill-owners, an element to be taken into consideration in determining the amount of damage suffered by them. The right acquired is exercised by the diversion of the water for the purposes named in the charter, and after the water is used for such purposes and converted into sewerage, the disposition thereof is wholly with the city. The sewerage is within the control of the city, and may be changed by it at any time, as the public good and necessities may require; and the mill-owners would have no voice, other than that incident to the right of citizenship in common with the other inhabitants, regarding the system, its location, or the place of its outflow. *Fisk v. Hartford*, 69 Conn. 375.

As the commissioners failed to assess damages upon a proper basis, the case should be remanded that the report may be re-committed upon that question.

WILLIAM ALLETSON v. ELMER D. POWERS.

May Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed September 19, 1900.

Facts showing no cause of action—That the grantee of real estate who assumed a mortgage upon it does not pay the interest, and the mortgage is foreclosed, are not facts which show the breach of a representation by the grantor that the mortgage could lie if the grantee paid the interest.

Facts showing breach of contract only—The failure of a grantor of mortgaged real estate to fulfil an agreement to pay the interest on the mortgage accrued at the time of the conveyance, is a breach of contract only, for which no recovery can be had in an action of tort.

CASE FOR DECEIT. Plea, the general issue. Trial by jury, Windham County, September Term, 1899, *Munson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

Waterman & Martin for the plaintiff.

Clarke C. Fitts for the defendant.

START, J. The plaintiff, in exchanging farms with the defendant, relied upon a representation that a mortgage resting upon the defendant's farm, which was assumed by the plaintiff, could lie for ten years, if the plaintiff kept the interest paid; the plaintiff did not pay the interest, and the mortgage was foreclosed. Without deciding whether an action will lie for a breach of such a representation, we hold that it does not appear that the foreclosure, by which the plaintiff was deprived of the property, was due to a breach of the representation, and that a verdict should have been ordered for the defendant.

The payment of the interest by the plaintiff was a condition precedent; without such payment, the mortgage was not to lie. The plaintiff was under a duty to pay the interest before the re-

presentation could be of any avail to him. He could not omit to do this and then be heard to say that he relied upon the representation and lost his farm in consequence of such reliance. He omitted to do the act which was first to be done, and the very act which would make it possible for him to remain upon the farm, if the representation had been true. Until the plaintiff paid the interest, the defendant was under no duty to make good his representation; and its falsity was a matter of conjecture and wholly immaterial.

In *Barry v. Wixon*, decided by the Supreme Court of Rhode Island, and reported in the 46th Atlantic Reporter, 42, the representation was, that the defendant had an agreement with the mortgagee by which the mortgage could run ninety-nine years, if desired, or so long as the interest on it was paid. The plaintiff did not tender the interest on the mortgage when it became due, and the court held that it did not appear that the mortgage sale by which the plaintiff was deprived of the property was due to a breach of the representation, and directed judgment for the defendant.

The failure of the defendant to pay the interest due upon the mortgage debt at the time of the exchange of farms was only a breach of contract; and for such breach, no recovery could be had in this form of action. *People v. Healy*, 128 Ill. 9; *Dove v. Morris*, 149 Mass. 188.

The view we have thus taken of the plaintiff's claimed right of action renders it unnecessary to consider the other exceptions reserved in the court below.

Judgment reversed and cause remanded.

CHARLES C. FAIRBANKS ET AL. v. TOWN OF ROCKINGHAM AND
HENRY C. LANE.

May Term, 1900.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON AND WATSON, JJ.

Opinion filed September 19, 1900.

Disqualification of justice—V. S. 901—Duties of justice under V. S. 3360 and 3361 judicial—A justice of the peace, acting under V. S. 3360 and 3361 relating to the appraisal of damages from the grading of a highway, is required to perform judicial functions, and a justice who is a taxpayer of the town concerned, is by V. S. 901 disqualified from so acting, on the ground of interest.

PETITION FOR MANDAMUS brought to the Supreme Court for Windham County at its May Term, 1900. Heard at that term on petition and answers thereto.

L. W. Read and *C. H. Robb* for the petitioner.

C. H. Williams and *Bolles & Bolles* for the petitionees.

START, J. The petitioners for the purpose of appealing from the assessment of land damages made by the selectmen of the Town of Rockingham, preferred their petition to the defendant, Henry C. Lane, as a justice of the peace, praying for the appointment of commissioners to re-hear and appraise the damages sustained by them by reason of the grading and cutting down of a highway adjacent to their premises. The justice issued a citation commanding the selectmen of the said town to appear before him and show cause why the prayer of the petition should not be granted. The selectmen appeared and moved to dismiss the petition for the reason that the justice was a tax-payer in the Town of Rockingham, and thereupon the justice dismissed the petition. The petitioners pray that a writ of mandamus may issue, commanding the justice to proceed and appoint commissioners to re-appraise their damages agreeably to the provisions

of the statute, and take such further action as the law provides in such cases.

The petitioners concede that the justice was, at the time he issued the citation, and at the time of the hearing before him, a tax-payer in the defendant town. In cases of this kind, if the land-owner is dissatisfied with the amount of damages awarded, or the refusal to award damages, he may petition a justice of the county, residing in an adjoining town, for the appointment of commissioners to appraise his damages; and the land-owner and the town are entitled to the same rights, and are subject to the same liabilities, that are provided by statute in proceedings before a justice to assess the damages caused by laying out a highway. V. S., secs. 3360, 3361. In proceedings before a justice for the assessment of damages when land is taken for a highway, the justice is required to issue a citation stating the time and place of hearing, which, with the petition, must be served on one or more of the selectmen at least six days before the hearing. And if the parties do not agree upon any other mode of appointing commissioners, the justice is required to make a list of eighteen disinterested freeholders of the town in which he resides, and, from this list, the commissioners are selected. V. S., secs. 3308, 3309. The justice is also required to annex a commission to the petition and citation and issue the same to such commissioners, directing them to impartially appraise the damages and make return of their doings on oath to him by a day fixed in the commission, if the damages awarded to any petitioner do not exceed forty dollars; and, on the return of the commissioners' doings to him, he is required to establish the appraisal, unless cause is shown to the contrary, and fix the time within which it shall be paid. V. S., secs. 3310, 3312. Also, the justice is required to allow, or disallow, costs. If the appraisal of the commissioners is more than was offered by the selectmen, he may render judgment for the petitioner to recover his costs; if less, he may render judgment for the town to recover its costs; and

he may issue execution to carry into effect any judgment rendered by him upon the report. V. S. sec. 3313.

The justice, in compliance with these requirements of the statute, was called upon to exercise judgment and discretion. He was required to name eighteen disinterested freeholders residing in a particular town, and thereby to pass upon the qualification of each person whose name he placed upon the list, and to issue to the persons chosen as commissioners a commission directing them as to their duties and procedure; and, if the report was returned to him, it was his duty to tax and award costs, establish the appraisal, unless cause was shown to the contrary, and render a judgment, upon which it was his duty to issue execution. The performance of these duties required him to act in a judicial capacity, and, under V. S., sec. 901, he was prohibited from acting in such capacity, if he was interested in the subject-matter of the petition. That he was interested clearly appears. He, with others, was under a legal duty to pay the damages and costs that should be awarded by his judgment. Being thus interested, he could not proceed to appoint commissioners and issue to them a commission. In order to do this, he must be qualified to do all that is required of a justice in such proceedings.

Petition dismissed with costs.

WILLIAM SAMSON v. JASPER A. ROUSE, JULIUS C. HUTCHINS,
PETITIONER.

May Term, 1900.

Present: ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed August 30, 1900.

Transaction constituting a pledge—If promissory notes are, without endorsement, delivered by the payee to a creditor as collateral security, the general title to the notes remains in the payee, and the transaction constitutes a pledge, the holder having only the special property and rights of a pledgee.

Possession essential to validity of pledge—It is essential to the validity of a pledge of personal property that possession be delivered to the pledgee, and he has a lien upon the property only so long as he retains possession, either actual, or, in certain circumstances, constructive.

Delivery back of pledge for special purpose does not interrupt possession of pledgee—If promissory notes, delivered without endorsement by the payee to a creditor as collateral security, are delivered back to the payee for convenience of collection, the payee agreeing to keep the security good at all times by keeping the same notes or by replacing them as collected by others of the same amount, such delivery back is for a special purpose, and does not in law interrupt the possession of the pledgee, so long as the notes so delivered back remain uncollected.

Pledged notes delivered back to pledgor for collection—When special property of pledgee does not attach to money collected—If a pledgor of notes as collateral security takes them back from the pledgee for convenience of collection under an agreement that he will on demand return the same notes to the pledgee or replace them with others of the same amount, the special property of the pledgee does not attach to money received by the pledgor in payment of the notes.

Pledged notes delivered back to pledgor for collection—Agreement for substitution—

When pledge fails—Agreement for a pledge does not constitute a pledge—If pledged notes are delivered back to the pledgor for convenience of collection under an agreement to return them to the pledgee on demand or to replace them with other notes, and other notes are not in fact substituted for the pledged notes when collected, and no particular notes were by the agreement specified to be used in such substitution, the pledge fails. An agreement for a pledge does not constitute a pledge.

Mingling of pledged notes with other assets—Not practicable to render them indistinguishable—Notes being distinguishable by dates, times of payment, face value, and names of signers, it is not seen how pledged notes delivered back to the pledgor for collection could before collection be so mingled with other assets of the pledgor as to make them indistinguishable, and to make applicable the principle that if an agent or trustee mingles trust funds with his own so that the trust property cannot be distinguished, the whole will be treated as such.

Confusion of personal property—Doctrine as to intermixture carried no further than necessity requires—The doctrine, applicable to the commingling by an agent or a trustee of property held in a trust capacity with funds of his own, is carried no further than necessity requires, and is not applicable to a mingling of pledged notes with other assets, in the absence of evidence tending to show that the pledged notes were thereby rendered indistinguishable.

The case—Application of foregoing principles—The petitioner received from a debtor firm certain endorsed notes as collateral security, and afterwards entrusted them to such firm for convenience of collection under an agreement that they, or others of the same amount, should be kept by said firm as such security, and should be delivered to the petitioner on demand. The notes so entrusted to the firm were for a time kept by themselves in an envelope, but were afterwards mingled with other notes, and were collected as they became due, and the money received from their collection was used by the firm in its business. None of them, nor others in lieu thereof, were ever turned over to the petitioner after they were so entrusted to the firm, though at one time the petitioner demanded the collateral called for by the agreement referred to. The assets of the firm, including notes to an amount more than the indebtedness of the petitioner, having gone into the hands of a receiver, it was held that the petitioner had no priority over the general unsecured creditors of the partnership.

CHANCERY. William Samson, a member of the firm of William Samson & Co., brought a bill against Jasper Rouse, his co-partner, returnable to the Court of Chancery for Franklin County at the September Term, 1897, praying, among other things, for the appointment of a receiver of the assets of said firm and such receiver was accordingly appointed. Thereafter Julius C. Hutchins, a creditor of said firm, filed a petition in said cause and the

matter of such petition was heard thereon, and on the report of a special master, at the March Term, 1899, *Start*, Chancellor.

The matter of the petition, and the decree of the Court of Chancery upon said hearing appear from the opinion. The petitioner appealed.

Farrington & Post for the petitioner.

Rustedt & Locklin and *Wilson & Hall* for the receiver.

WATSON, J. Prior to October 14, 1889, Julius C. Hutchins, the petitioner, held an unsecured note against William Samson & Company for four or five hundred dollars, and on that day loaned the company a sum of money, which, with the note, amounted to \$1500, and took the company's note therefor, and at the same time the company delivered to him certain promissory notes amounting to \$2070, secured by liens on personal property, to hold as collateral security. On January 1, 1890, Hutchins, being about to go to California and to be absent from the State a long time, delivered the collateral to the company and took its receipt therefor as follows:

"Montgomery Center, Vt., Jan. 1st, 1890.

Received of J. C. Hutchins notes to the amount of \$2070.00 being the same notes turned out to J. C. Hutchins Oct. 14th, 1889, to secure a note given that day of \$1500.00, the same to be kept, or the same amount, by William Samson & Co. and to be returned to J. C. Hutchins on demand.

WILLIAM SAMSON & Co."

The notes were thus delivered to the company that they might be collected when due, and for the convenience of the company in collecting, that it might deliver the notes when paid to the parties paying the same. The company was to replace notes collected by other notes, and to keep the security good at all times. Hutchins depended upon the security, and it was delivered by him to the company in good faith and with the understanding that the company was to keep the notes, or other

notes of the same amount, on hand at all times to secure his note against it.

In 1897, the orator and defendant, partners composing the company, being in some difficulty between themselves, were unable longer to carry on the partnership business, and the above named suit was brought; and on August 16, 1897, the receiver was appointed to take charge of the property of the company with power to sell and dispose of the same for the purpose of paying partnership debts. A master was appointed to determine and report the amount due each creditor, and whether the same was secured; and the facts herein stated were found and reported in such proceedings.

None of the collateral notes were ever returned to Hutchins, nor were other notes turned over to him as collateral in lieu thereof. After the notes were delivered to the company by Hutchins, they were kept by it in an envelope separate and distinct from the other assets of the company until about December, 1891, when they were mingled with the other assets. The notes were collected by the company as they became due, and none of them came into the hands of the receiver; but other lien notes of similar character, to more than the amount due on the \$1500 note, did come into his hands, as part of the assets of the company. Sometime in July, 1897, Hutchins read the receipt in the hearing of one of the members of the company, and said that as the receipt called for so much collateral on demand, he then demanded it, but his demand was not complied with. There was due on the \$1500 note to Hutchins, Feb. 9, 1898, the sum of \$1,079.33.

Based upon the foregoing facts, Hutchins preferred his petition in said cause, therein praying that the receiver be ordered and directed, 1st, to deliver to him sufficient collateral of like character with that held by him, to make good the collateral called for in the receipt; or 2nd, that the receiver be ordered and directed to pay the amount due on the \$1500 note from the

funds in his hands under the receivership; and for general relief.

The Court of Chancery denied the relief specifically prayed for, and ordered and decreed that the sum found due the petitioner be paid *pro rata* with other unsecured claims proved and allowed against the company, out of the assets that may be in the hands of the receiver for distribution among the general creditors whose claims have been proved and allowed; and upon appeal therefrom, the questions involved are here for determination.

The record shows that the collateral notes were payable to the company, but it does not show that they were indorsed by the company, nor even that they were negotiable in form. The general title to the collateral, therefore, remained in the company, with a special property in Hutchins, which gave him the right of possession until the note secured thereby should be paid. The transaction constituted a pledge, and his rights were those of a pledgee, incident thereto. *Wood v. Dudley*, 8 Vt., 430; *Gifford v. Ford*, 5 Vt., 532; *Casey v. Cavaroc*, 96 U. S. 467.

It is essential to the validity of a pledge of personal property that possession be delivered to the pledgee, and he has a lien on the property only so long as he retains the possession. *Fletcher v. Howard*, 2 Aik. 115; *Russell v. Filmore*, 15 Vt. 130. Under some circumstances, constructive possession is sufficient to answer the requirements of the law, but when, it is not now necessary to consider; for that phase of the law is not involved in this case.

The delivery of the collateral back to the company for its convenience in collecting, that the notes might be collected when due, and be delivered to the makers, when paid, and to be then replaced by other notes as security, the company undertaking to keep the security good at all times by either keeping the same notes or others of the same amount, was a delivery back for a special purpose, and did not in law interrupt the possession of the pledgee so long as the notes remained uncollected; and had the

same notes, unpaid, come into the hands of the receiver as a part of the assets of the company, there would seem to be no doubt regarding the pledgee's right thereto. *Clark v. Iselin*, 88 U. S. 360; *Casey v. Cavaroc*, 96 U. S. 467; *Way v. Davidson*, 12 Gray, 465; *White & Williams v. Platt*, 5 Denio. 269; Jones on Pledges, secs. 86-88. But the record states that the notes were collected by the company when due and none of them came into the hands of the receiver.

It is contended by the pledgee that he is entitled to full payment of the \$1500 note, out of the funds in the receiver's hands, because the company collected the collateral notes and the money received thereby went into the company's business, and to its benefit; but this contention is unsound. The collateral notes were not delivered back to the company to be collected and the money held for the pledgee. Such was neither the express nor implied understanding of the parties. The company undertook to replace the notes as collected, by other notes as security, to keep the security good at all times, and return the same notes, or other notes of the same amount, to the pledgee on demand. Nor was the understanding of the pledgee different; for the record states that he understood the company was "to keep these notes, or others of the same amount, on hand to secure his said note at all times." The company had a right to use the money collected, in its business, as it did use it, without accounting therefor. The pledgee waived his privilege therein, and is not now entitled to a preference, over other creditors, in the payment of his note.

Nor has he any lien on the notes that came into the receiver's hands. In the agreement to replace the notes collected, by other notes, no particular notes were specified to be used for that purpose, and the pledgee never had the possession of any of the notes that came into the hands of the receiver. Thus replacing the notes rested wholly in the understanding and agreement of the parties, and such understanding and agreement did not con-

stitute a pledge ; because "an agreement for a pledge raises no privilege." *Casey v. Cavaroc, supra.*

In Jones on Pledges, sec. 29, the law is stated that, "An engagement to deliver property in pledge amounts to nothing as security. The pledgee acquires no right of property until delivery is actually made. A delivery cannot be dispensed with by a written agreement that the party making the pledge will hold it as the bailee of the pledgee." And in *Donald v. Suckling*, 21 Eng. Rul. Cas., at page 328, it is said by Mr. Justice Blackburn, that, "Till possession is given, the intended pledgee has only a right of action on the contract, and no interest in the thing itself."

It is also contended by the petitioner that the mingling of the collateral notes, before they were collected, with the other assets of the company, was such a confusion of property as entitles him to a priority of right over other creditors upon the entire mass of assets. The principle here sought to be invoked, that if an agent or trustee mingles trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own, is not applicable. A statement of the principle shows its limitation. If the trust property may all be distinguished from the property with which the same is mingled, it will be so done, and the whole intermixture is charged with the trust only when the trust property cannot be thus distinguished. The rule is carried no further than necessity requires. *Frith v. Cartland*, 2 H. & M. 417 ; *In Re Hallett's Estate*, 13 Ch. D. 719 ; 2 Kent's Com. 365.

In the case at bar, nothing is disclosed tending to show that the collateral notes could not have been distinguished at all times before they were collected, and we can conceive of no reason why they could not, as well as property generally, that has distinctive features of its own. It is not within reason to suppose that the company had other notes of the same dates, payable at the same times, of the same face values, and signed by the same persons, with which the collateral notes were mingled.

Upon the facts disclosed by the record, the petitioner has no standing other than as a general unsecured creditor, and

The decree is affirmed and cause remanded with mandate.

Thompson, J., deceased before the case was determined.

SAMUEL HOWARD v. JED P. CLARK AND HENRY O. CLARK.

October Term, 1899.

Present: ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed August 30, 1900.

Foreclosure on annulment of quitclaim deed and reinstatement of mortgage—

*Accounting as by mortgagee in possession—*The orator, while holding a first mortgage upon a farm upon which there was a second mortgage of which he had neither actual nor constructive knowledge, was fraudulently induced by the mortgagor to take a quitclaim deed of the farm to satisfy his mortgage; but upon petition to the Court of Chancery such proceedings were had that in accordance with a mandate of the Supreme Court the quitclaim deed was decreed to be null and void, and the orator's mortgage and the notes secured thereby were decreed to be in full force, and the orator's mortgage was reinstated as a senior mortgage and foreclosed with the right to redeem in the mortgagor and the second mortgagee. Now, on the foreclosure accounting to determine what sum the second mortgagee must pay to redeem, the orator, or those holding under him, having in the meantime had possession of the farm in question, the orator must account, as a mortgagee in possession, for rents and profits.

*Accounting—Allowances in favor of orator—Decree entitled orator to interest on mortgage debt—*The decree of the Court of Chancery that the orator's mortgage notes were in full force imported the right to interest thereon as well as to the principal thereof.

*Accounting—Allowances in favor of orator—Orator entitled to benefit of permanent improvements—*Permanent improvements having been made in good faith by those holding under the orator, he and they believing that they had an absolute title to the property, and the second mortgagee having

forwarded this mistaken belief to the extent which the facts stated in the opinion disclose, the orator is entitled in the accounting to the benefit of such improvements.

*Accounting—Rule by which to determine value of permanent improvements—*If the cost of the permanent improvements exceeded the amount to which they had enhanced the value of the property, then the enhancement of value must determine the amount to be allowed the orator for such improvements. The value of the permanent improvements should be placed at such sum as the value of the premises was enhanced by such improvements made before the decision of the Supreme Court declaring the orator's mortgage to be in force and the quitclaim deed to him to be void.

*Accounting—Orator not entitled to interest on value of permanent improvements—*As the orator, or those holding under him, had the benefit of the permanent improvements, the orator is not, in the accounting, entitled to be allowed interest on the value of such improvements.

*Accounting—Allowances in favor of orator—Orator entitled to allowance for taxes paid, exclusive of taxes on improvements—*All taxes paid upon the property, exclusive of permanent improvements, whether paid by the orator or any one holding under him, should enter into the accounting in the orator's favor.

*Accounting—Allowances against orator—Rule as to estimating rents and profits—*Aside from the question of permanent improvements, the rule is treated as applicable that the mortgagee in possession is only bound to account for what he receives from the mortgaged premises, or for what he might receive therefrom by the use of fair and reasonable diligence and prudence, and that, when the mortgagor himself occupies, he will be charged with such sums as will be a fair rent for the premises without regard to what he may in fact have realized as profits from the use of them.

*Accounting—Rents and profits from permanent improvements not to be accounted for—*The orator should not account for the rents and profits of permanent improvements. He should account only for such rents and profits as he would have been chargeable with had the permanent improvements not been made.

*Accounting—Rents and profits during possession of orator's grantees—*A separate action will not lie for rents and profits in the case of a mortgagee in possession. They can only be recovered as an incident to the right to redeem, and for this reason, if for no other, the orator must account for rents and profits covering a time when the property was in the possession of those holding under him, although in respect to the right to such accounting the second mortgagee stands in the same situation as the mortgagor.

Former decision—As preliminary to the questions here decided see this case, 71 Vt. 424.

CHANCERY. Decree of foreclosure rendered in accordance with the mandate of the Supreme Court, Chittenden County, March Term, 1899, *Taft*, Chancellor. For mandate see 71 Vt. 424. The sum to be paid on redemption was fixed at the amount due on the orator's notes as found by the report of a special master. The defendant Henry O. Clark appealed. Before the decree was rendered the above named Samuel Howard died, but the title of the case remaining unchanged on the court docket, he is herein designated as the orator.

C. W. Witters for the orator.

Powell & Powell for the defendant.

WATSON, J. December 10, 1883, the defendant Jed P. Clark executed to the orator a primary mortgage of a farm in Milton, Vt., to secure the payment of \$4,000. September 8, 1892, he executed a mortgage covering the same farm, to the defendant Henry O. Clark, to secure the payment of more than \$13,500. March 21, 1893, the orator, with neither actual nor constructive knowledge of the mortgage to Henry O., was about to foreclose his mortgage, whereupon Jed P. fraudulently induced him to accept a conveyance of the farm, by quitclaim deed, as payment of his mortgage debt, and in discharge of his mortgage.

As to the orator, the transaction was held to be a fraud, when the case was before this court as reported in *Howard v. Clark*, 71 Vt. 424, the quitclaim deed was decreed to be null and void, and the orator's mortgage and mortgage debt were reinstated and decreed to be in full force. The question now presented is, whether, under the circumstances, upon redemption by the second mortgagee, the orator shall be compelled to account as mortgagee in possession, for the rents and profits of the farm. He took possession of it under the quitclaim deed, and afterwards contracted to sell it to one Murray who went into posses-

sion under his contract but received no deed. Murray, while in possession, sold his interest in the farm to E. D. Teachout, and conveyed it to him by quitclaim deed ; and subsequently, March 18, 1896, the orator sold and conveyed the farm to Teachout by warranty deed. At the time of this conveyance, the orator had no knowledge of the mortgage to Henry O., and did not learn of it until April 20, 1896, when he was informed by the attorney of Teachout. Teachout had no knowledge of it before the last named date, when he received a hint from Henry O., which led to a search of the title by his attorney and the notice by him to the orator. In June, 1893, Henry O. learned of the conveyance of the equity of redemption to the orator, and of the possession of the farm by him and by Murray, but gave them no notice of his mortgage, although at the time he took it, he knew of the mortgage to the orator, and that the debt secured thereby was unpaid. The purchase price for the conveyance to Teachout was \$4800, and the farm was then worth that sum ; it was worth \$4000 at the date of the quitclaim deed to the orator ; and it is now worth \$8000. Teachout has built two cottages and one double house on the premises, the value of which is not included in the valuation of \$8000, and he has sold five building lots from a part of the farm.

The general rule is that a mortgagee in possession must account for rents and profits when the sum due in equity is determined in a foreclosure proceeding ; and ordinarily the mortgagor's right to such an accounting is incident to his right of redemption. *Seaver v. Durant*, 39 Vt. 103 ; *Hubbell v. Moulson*, 53 N. Y. 228. But such an incident is not inseparable ; for the right to an account may be extinguished by a release, or an accord and satisfaction ; or the neglect of the mortgagor in asserting his claim, may have been such as to render it unfair for him to insist on an account covering the whole time of possession, and unjust to the mortgagee to be compelled so to account. *Russell v. Southard*, 12 How. 139.

In the case cited, the mortgagee and those holding under him had been in possession for more than sixteen years, during all which time the mortgagor neglected to look to and assert his rights. The persons in possession treated the property as their own, and it greatly appreciated in value. The court held that the negligence of the mortgagor may have led to expenditures on the premises, the benefit of which would be lost to the ones making them, and that the interest on the mortgage debt and the account of rents and profits should commence with the filing of the bill.

In *Wright v. Parker*, 2 Aik. 212, and in *Hunt v. Tyler*, 2 Aik. 235, there being no evidence as to the value of the rents and profits, it was held that no account thereof should be taken while the mortgagee was in possession, nor of the interest on the debt during the same time.

In the case at bar, the defendant Henry O. Clark contends that the orator should account for the rents and profits not only during the time he was personally in possession of the premises, but also during the time of the possession by Murray and by Teachout. The orator contends that he has been greatly injured by the fraud practiced upon him by the mortgagor, by reason whereof, to be obliged to thus account would be so inequitable and unjust as to preclude the mortgagor from the benefits of such an accounting; and that as a subsequent mortgagee, in respect to his right to redeem a prior mortgage, stands in the same situation as the mortgagor, Henry O. is precluded therefrom.

It is true that a subsequent mortgagee, in this respect, stands in the same situation as the mortgagor, and is bound to pay the same sum in redemption that the latter would have to pay. 2 Jones on Mort. sec. 1118; *Harrison v. Wyse*, 24 Conn. 1, 63 Am. Dec. 151. But we think the orator's position is otherwise unsound. In the principal case, the court said that in granting relief to the orator, the mortgagor must, as far as possible, be restored to his rights with the privilege of redeeming the premises by paying the orator the sum found due in equity upon his mortgage with costs of suit; and in the decree, the orator's

notes and mortgage were declared to be in full force, as a senior encumbrance; and by that decree (which is binding upon the parties here), the orator is entitled to the interest, as well as the principal, due upon his notes, for, otherwise, he is not allowed the benefit of their full force. If a mortgagee is allowed interest on his debt while in possession, we know of no rule in equity by which it can be said that he shall not account for rents and profits received by him during the same time, unless the mortgagor's right thereto has been in some manner extinguished. To receive both without accounting for the latter, might result in the mortgagee's receiving very much more for the use of his money than the law allows as interest, which, for obvious reasons, would not be decreed by a court of equity.

If rents and profits could be recovered in a separate action brought for that purpose against a mortgagee in possession, there would be more force in the contention that such accounting cannot be had of the orator covering the time of the possession by Murray and by Teachout; but a separate action therefor will not lie. They can be recovered only in equity, and as an incident to the right to redeem. *Chapman v. Smith*, 9 Vt. 153; *Seaver v. Durant*, 39 Vt. 103; *Dewey v. Brownell*, 54 Vt. 441.

The orator in the last named case brought foreclosure proceedings, and the sum due in equity was established without his making any claim for repairs and improvements, and the same was paid within the time limited therefor. Subsequently, he brought his bill in the case referred to, praying for a decree that the defendant pay for the repairs and improvements. It was held that the decree in the foreclosure proceedings was conclusive upon the question of the sum due in equity, and that the bill could not be maintained. And it is said by Williams, Ch. J., in *Chapman v. Smith*, *supra*, that the decree is alike conclusive as to the account for rents and profits.

In *White v. Maynard*, 54 Vt. 575, the mortgagee conveyed the mortgaged premises by warranty deed to a third person, and it was held that the mortgagee must account for the rents and

profits during the time his grantee was in possession under such conveyance.

For the same reason, if a mortgagee in possession transfers his mortgage to a third person who seeks to foreclose it, such third person takes the mortgage subject to the equities existing in favor of the mortgagor against the mortgagee, at the time of the transfer; and in ascertaining the sum due in equity, he must account for the rents and profits received by the mortgagee, as well as by himself. *Ackerson v. The Lodi Branch R. R. Co.*, 31 N. J. Eq. 42.

The question then arises, upon what basis shall the accounting be had? The ordinary rule is laid down in *Sanders v. Wilson*, 34 Vt. 318, thus: "A mortgagee in possession is only bound to account for what he receives or might receive from the mortgaged premises by the use of fair, reasonable diligence and prudence, and if the premises are rented, and rents lost by the failure of a tenant, without fault of the mortgagee, he is not held liable to account. But when the mortgagee himself occupies, and especially when the premises are a farm in cultivation, upon which labor and expenditure are to be bestowed, to produce annual crops, and profits, the mortgagee will be charged with such sums as will be a fair rent for the premises, without regard to what he may, in fact, have realized, as profits, from the use of it."

Sometimes, however, in order to do justice between the parties in adjusting the equities, it becomes necessary to take into consideration other important elements.

In the case at bar, when the orator contracted the premises to Murray, and when he sold and conveyed them to Teachout, he supposed and had reason to suppose that the fee was in himself with no incumbrance on the property. Teachout took a conveyance of the same, by warranty deed, believing he was thereby getting an absolute title, and he sold building lots from a part of the farm; and cottages, one double house, and perhaps other buildings, were erected on the premises either by Teach-

out or by those to whom he sold the building lots, before the orator or Teachout learned that Henry O. Clark held a mortgage on the premises subsequent to the one given to the orator. Henry O. had knowledge that the debt to the orator was unpaid, and that the mortgage securing the same was in life and undischarged ; he learned of the quitclaim deed from the mortgagor to the orator, and had knowledge that the latter was in possession of the property, more than two and a half years before the conveyance to Teachout ; and he also had knowledge of Murray's possession ; but at no time gave them, nor anyone holding under them, notice of his mortgage.

Under these circumstances, permanent improvements were made in good faith by those holding under the orator, believing they had an absolute title to the property, and to allow the subsequent mortgagee seeking to redeem, to have the benefit of such improvements without making compensation therefor, would be inequitable and unjust.

Mr. Washburn in his work on real property, vol. 2, at page 583, says : " The rules upon this subject do not seem to be uniform. In some of the states a mortgagee is allowed to charge for beneficial and lasting improvements. And this is sometimes the case even in England. And such would probably be uniformly the rule where the mortgagee in making such improvements supposed himself to be the absolute owner, or the person who made them was an innocent purchaser, or did it by consent and agreement of the mortgagor."

In Jones on Mort. sec. 1127, it is said : "The ordinary rule in respect to improvements is that the mortgagee will not be allowed for them further than is proper to keep the premises in necessary repair ;" but (sec. 1128) "when the mortgagee makes permanent improvements, supposing he has acquired an absolute title by foreclosure, upon a subsequent redemption he is allowed the value of them, especially if the mortgagor has by his actions to any extent forwarded the mistaken belief * * * *. In like manner, a purchaser in good faith from the mortgagee in posses-

sion and with the assurance that he gave a perfect title, is entitled to allowance for improvements made by him thereon, although these consist of new structures." See also *Morgan v. Walbridge & Chase*, 56 Vt. 405; *Hadley v. Stewart*, 65 Wis. 481; *Meckles v. Dillaye*, 17 N. Y. 80; *Benedict v. Gilman*, 4 Paige 58.

But as the orator or those holding under him, have had the benefit of the rents and profits of the permanent improvements, they are not entitled to interest on the value of them; and the value should be placed at such sum as the improvements made before the decision of this court in the principal case, enhanced the value of the premises, and not at their cost, in case the cost exceeds the added value by reason thereof. *Hadley v. Stewart*, 65 Wis. 481.

Nor should the orator account for the rents and profits of such improvements. He should only account for such rents and profits as would have been received from the property without the permanent improvements. 1 Wash. Real Prop. 630; *Bell v. Mayor of New York*, 10 Paige, 49; *Moore v. Cable*, 1 Johns. Ch. 385; *Montgomery v. Chadwick*, 7 Iowa 134.

All taxes paid upon the property exclusive of permanent improvements, by the orator or any one holding under him, may properly enter into the accounting in the orator's favor. 2 Jones on Mort. sec. 1134.

In the accounting had before the master, the rents and profits were included only for the time the orator was personally in possession of the premises, and the questions of improvements and taxes paid, were not taken into consideration.

The decree, therefore, will be reversed, and cause remanded with mandate to recommit the report, that an accounting may be had upon the basis herein indicated.

Thompson, J., deceased before the disposition of the case.

HARDWICK SAVINGS BANK AND TRUST COMPANY v. B. F. DRENAN.

May Term, 1900.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Opinion filed September 19, 1900.

*Evidence—Declaration of agent when not a part of the res gestæ—Declaration of opinion or information rather than of knowledge—Declaration of agent as to matter to which his employment does not extend—*The question being whether the plaintiff corporation had notice that a bond running to it, and signed by the defendant as surety, was not to be used until it was signed by another surety, evidence to show that long after the bond was accepted by the plaintiff and not at the time of any transaction respecting the bond, the plaintiff's treasurer told the defendant's attorney that the plaintiff took an assignment of a life insurance policy and a chattel mortgage in place of another surety, was not admissible, it not appearing that the treasurer had anything to do with the taking of the bond, or any authority in connection therewith, nor that he had any personal knowledge of the fact sought to be shown by his declaration.

*Evidence—Illustrations and experiments as evidence—Experiments before the jury—Experiments by the jury—Similarity of conditions and circumstances—*The plaintiff claiming that a bond, which when produced in court had no seals upon it, was originally sealed with paper taken from the gummed margin of postage stamps, and that such seals had been lost without the fault or agency of the plaintiff, the defendant was properly denied permission to exhibit to the jury a sheet of postage stamps to illustrate how well the margin of such stamps are gummed and the size of a seal that can be taken from them. The defendant was also properly denied permission to adhere the margin of stamps to a piece of paper in the presence of the jury, for the purpose of letting the jury test the matter of their removal. In the absence of any offer to show similarity of conditions and circumstances the proposed illustrations and experiments were irrelevant.

*Evidence—Irrelevant facts—*Evidence offered in behalf of the defendant to show that one G. A. Dow, a principal in the bond sued on, offered an insurance policy to various persons to secure them for signing the bond if they would sign it, without evidence tending to connect the plaintiff with Dow's act, had no tendency to show that the words "and one life insurance policy of G. A. Dow" in the surety clause of the bond, were not in it when the defendant signed it as surety.

DEBT ON BOND. Plea, the general issue with notice. Trial by jury, Caledonia County, December Term, 1899, *Watson, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

George A. Beede and George A. Dow, as principals, and the defendant, B. F. Drenan, as surety, signed the instrument in question. In the body of the instrument when produced on trial, after the words describing the defendant as surety, were the words "and one life insurance policy of George A. Dow."

It appeared that in the negotiations with respect to the bond and its acceptance, the plaintiff was represented by one Johnson, a director of the plaintiff; that the treasurer of the plaintiff performed the usual duties and had the usual authority of treasurers of such corporations as the plaintiff.

Wendell P. Stafford and *Taylor & Dutton* for the plaintiff.

J. P. Lamson for the defendant.

STARF, J. The defendant signed the bond in suit as surety; and he claimed that it was agreed between him and the principals to the bond that the bond should not be used until it was signed by another surety, and that this agreement was known to the plaintiff. The defendant offered to show that, after the bond was accepted, and before the commencement of this suit, the plaintiff's treasurer told the defendant's attorney that the plaintiff took an assignment of a life insurance policy and a chattel mortgage in place of another signer upon the bond. The offer was excluded and the defendant excepted. In this, there was no error. The treasurer was transacting no business respecting the bond at the time the declaration was made; and it does not appear that he had authority to take the bond, or anything to do with the taking of it, nor does it appear that he had any personal knowledge of the fact sought to be shown by his declaration. Also, the declaration was made long after the negotiations relating to the taking of the bond had been ended and the bond accepted by the plaintiff. Under these circumstances, the declarations of

the plaintiff's treasurer, as such, were not binding upon the plaintiff, nor were they evidence of the fact that was in issue respecting the plaintiff's knowledge. *Tower v. Rutland*, 56 Vt. 28; *Mason v. Gray*, 36 Vt. 308; *Lyndon Mill Co. v. Lyndon Institution*, 63 Vt. 581.

The bond when produced in court had no seals upon it; but the plaintiff's testimony tended to show that it was originally sealed with paper taken from the gummed margin of postage stamps, and that the seals had been lost without the fault or agency of the plaintiff. The defendant introduced evidence tending to show that the bond was not sealed when he signed it; and, upon this issue, he produced in court a sheet of postage stamps and offered them in evidence, to show to the jury how well the margin of the stamps are gummed and the size of the seal that can be taken from them. He also offered to adhere the margin of the stamps to a piece of paper in the presence of the jury, and when dried to let the jury remove them. This offer was properly excluded. The offered test or experiment lacked the similarity of circumstances and conditions necessary to make it admissible. There was no offer to show that such margins, when once adhered to paper, will remain unaffected by time, or the conditions under which they are kept or handled. If such testimony is ever admissible, which we do not decide, the test or experiment must be under similar conditions and circumstances. *Congdon v. Howe Scale Co.*, 63 Vt. 255.

The defendant claimed that the words, "And one Life Insurance Policy of G. A. Dow's", were not in the bond when he signed it, and, upon this issue, offered to show that before Dow said anything to the plaintiff about using the policy, he, Dow, had offered the policy to other parties to secure them for signing the bond. It is difficult to see how this evidence could have any bearing upon this issue; but, if it had, it was properly excluded, for the reason that there was no offer to connect the plaintiff with Dow's act. He was not the plaintiff's agent, and what he

did and said when none of the plaintiff's officers were present could not be shown:

Judgment affirmed.

J. C. GRIFFITH, ADMINISTRATOR, v. NEW ENGLAND TELEPHONE
AND TELEGRAPH COMPANY.

May Term, 1900.

Present : ROWELL, TYLER, MUNSON, STARR and WATSON, JJ.

Opinion filed September 19, 1900.

Telephone business—Business requiring special knowledge and skill to the end of safety—The business of maintaining and operating a telephone line, as shown by the evidence referred to in the opinion, is one that requires special knowledge and skill in the construction, inspection and repair of the line and instruments, and in the use of known and approved devices, if any there be, to guard against harmful effects to persons and property from electricity which may be conducted over the line and into the instrument.

Telephone business—Implied undertaking of company in respect to special knowledge and skill—It follows that a telephone company, in contracting to place and maintain its instruments in connection with its wires for the use of its patrons in dwellings and other buildings, in the absence of stipulations to the contrary, is deemed to have undertaken to possess and exercise special knowledge and skill in respect to the maintaining and operation of a telephone line.

Telephone business—Care required that of a prudent man in like circumstances—Duty in respect to the use of known and approved devices—If, in the exercise of the care of a prudent man in like circumstances, a telephone company has reasonable grounds to apprehend that lightning will be conducted over its wires to and into a house, in which it has placed one of its instruments, and there do injury to persons or property, and there are known and approved devices for arresting or dividing such lightning so as to prevent such injury therefrom, then it is the duty of the company to exercise due care in selecting, placing and maintaining such known and approved

devices as are reasonably necessary to guard against accidents fairly to be expected to occur from lightning when conducted into a house over telephone wires.

Lightning as an act of God—When inquiry with reference thereto is not involved—

When there is evidence to show that an injury was inflicted by a portion of a diffused bolt of lightning, such that it could be controlled when upon a telephone wire by the use of known and approved appliances, and the jury so find, the general question of whether a bolt of lightning can be controlled, in its passage from the clouds to the earth, by any human agency, is not involved.

The case—Question of defendant's negligence here for the jury—

In this case there was evidence tending to show that the decedent, while sitting under a telephone instrument, maintained in his house by the defendant company under a contract with him, was killed, during a sudden storm, by a portion of a diffused bolt of lightning carried into his house and to said instrument over the defendant's wire, and that the portion of the force of lightning by which he was so killed might have been safely conducted to earth by known and approved appliances, and that such appliances were not provided by the defendant. There was, therefore, evidence from which the jury might find that negligence on the part of the defendant, was the cause of the decedent's death.

The case—Question of contributory negligence here for the jury—

Upon the question of contributory negligence on the part of the decedent, the evidence was not so decisive either way as to leave no room for reasonable doubt or opposing inferences, and that question was therefore properly for the jury.

Same—Evidence in the light of matters of common knowledge—

The facts, circumstances and surroundings which the evidence tended to show, might properly be considered in the light of the common and extensive use of telephones and the manner and places of their use.

CASE, brought by the plaintiff as administrator of the estate of Dr. Royal T. Sawyer, deceased, to recover the pecuniary damages suffered by his next of kin in consequence of his death, claimed to have been caused by the wrongful act, neglect or default of the defendant. Plea, the general issue. Trial by jury, Rutland County, September Term, 1899, *Taft*, C. J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

At the close of the evidence the defendant moved the court to direct a verdict in its favor. This motion was overruled. The grounds of the motion as summarized by the defendant's counsel were as follows :

1. That the plaintiff's intestate's death having been caused by a flash of lightning, the defendant was not under any contractual obligation to prevent the occurrence.

2. That it was impossible to have prevented it. That there was no appliance, or device, which could have prevented it; and that in the absence of any express contract of insurance, no legal duty was imposed upon the defendant to perform an impossibility.

3. That the plaintiff's intestate was guilty of such contributory negligence that no recovery could be had.

G. E. Lawrence and Butler & Moloney for the plaintiff.

Hunton & Stickney for the defendant.

START, J. The evidence tended to show that the plaintiff's intestate, Dr. Sawyer, was killed by lightning while sitting in his house, under a telephone instrument owned by the defendant and by the defendant there placed, maintained and connected with its telephone line and instruments under a contract to do so for a stipulated rent to be paid by the deceased. The plaintiff claims that the lightning came to and entered the house over the defendant's telephone wire; that the defendant was negligent in that it did not provide and maintain, in connection with its wires and instruments, any appliance to conduct the lightning to the ground, or out of the house, without injury to the inmates therein; and that the deceased came to his death by reason of such neglect.

It appears that telephone wires from strokes of lightning, atmospheric conditions, and by coming in contact with electric light and trolley wires, may become charged with electricity so as to endanger life and property. And the evidence tended to show, that, in the absence of proper appliances and ground con-

nections, a current of electricity may jump from a telephone wire or instrument. In view of these facts and others that will be herein referred to, it is clear that the business of maintaining and operating a telephone line is one that requires special knowledge and skill in the construction, inspection and repair of the line and instruments, and in the use of known and approved devices, if any there be, to guard against harmful effects to persons and property from electricity which may be conducted over the line and into the instruments; and the defendant, in engaging in the business, and in contracting to place and maintain its instruments in connection with its wires for the use of its patrons in dwellings and other buildings, in the absence of stipulations to the contrary, is deemed to have undertaken to possess and exercise such knowledge and skill. 10 Am. & Eng. Ency. Law, 2d. ed., 872; *Brown v. Edson Electric Illuminating Co.* (Md.), 46 L. R. A. 745; *McKay v. Southern Bell Telephone Co.*, 111 Alabama 337, 56 Am. St. Rep. 59; *Griffin v. United Electric Light Co.*, 164 Mass. 492, 49 Am. St. Rep. 477; *Pecham v. Portland Electric Co.*, 33 Oregon 451, 72 Am. St. Rep. 730. Having undertaken to place and maintain the instrument in the house and connect it with its telephone line for the use of the deceased, in so doing, it was under a duty to exercise the care of a prudent man in like circumstances. If, while in the exercise of such care, it had reasonable grounds to apprehend that lightning would be conducted over its wires to and into the house, and there do injury to persons or property, and there were known and approved devices for arresting or dividing such lightning so as to prevent injury therefrom to the house or persons therein, then it was the defendant's duty to exercise due care in selecting, placing and maintaining, in connection with its wires and instruments, such known and approved appliances as were reasonably necessary to guard against accidents that might fairly be expected to occur from lightning, when conducted to and into the house over its telephone wires. The questions reserved for consideration are, whether the evidence tended to show a neglect of duty on the

part of the defendant in these respects; and whether the deceased, while in the exercise of due care on his part, came to his death by reason of such neglect.

The evidence tended to show, that at the time Dr. Sawyer was killed, one of the defendant's telephone poles was struck by lightning at a point about one quarter of a mile northeast of Dr. Sawyer's house; that the lightning seemed to spread and go in different directions, the wires being lit up and seeming to be all ablaze; that this pole was split in two, and several other poles in the immediate vicinity, and in the direction of Dr. Sawyer's house, were injured and the wire severed; that, at a point a mile and a half beyond Dr. Sawyer's house, the wire was wound around a lead pipe that was found to be melted, and in the opposite direction from Dr. Sawyer's house, at Putnamsville, traces of electricity were found upon an instrument; that, just before the lightning struck the defendant's telephone line, Dr. Sawyer was seen sitting in his house, under the telephone instrument, reading from a book; that, just after, his hair was discovered on fire and red lines were found extending down his neck, chest and side; that traces of electricity were found on the carpet, paper and floor under the chair in which he was sitting; that these were the only marks to indicate that lightning had entered the house; that no device, as a safeguard or protection against electrical disturbances, was attached to, or connected with, the instrument, except on top, where there was a device consisting of two metal plates, which, to be complete, should be furnished with a wire attached to one of the plates and running to the ground, and between the two plates was a plug intended to "short current the two plates without entering the bell cell", but owing to a defect in the construction of the instrument the plug did not serve the purpose for which it was intended.

This testimony tends to show that when the lightning struck the defendant's telephone poles, it diffused and went to earth by telephone poles in the immediate vicinity and over a wire leading to Putnamsville; and in an opposite direction over

a wire to Wheeler's; and that, in going to earth by way of Putnamsville, a part of the current passed over the wire to and into Dr. Sawyer's house. In the absence of any other strokes of lightning at that time, in the vicinity, and of any marks about the house that indicated that lightning had entered it in any other way, the jury could properly infer, from the facts which the evidence tended to show, that the lightning which killed Dr. Sawyer came to and entered the house over the defendant's telephone wire.

The defendant contends that the force which killed Dr. Sawyer could not have been controlled, diverted or interrupted by human agency. A determination of this question requires a consideration of the evidence. As we have seen, the evidence tended to show, that the lightning struck the defendant's telephone pole a quarter of a mile from Dr. Sawyer's house; that it diffused and went to earth by several different routes; and that only a small part of that force went to Dr. Sawyer's house. If the jury found as this evidence tended to show, then they were not called upon to find whether any human agency can control the course of a bolt of lightning in its passage from the clouds to the earth. In that event, they were only required to find whether the course of such part of a bolt of the lightning as the evidence tended to show went to Dr. Sawyer's house can be controlled when it is upon a telephone wire; and, in this connection, the question was whether the particular force which the evidence tended to show passed over the defendant's telephone line and killed Dr. Sawyer could, by proper ground connections, and by the use of known and approved appliances, have been controlled or diverted so as to have prevented the injury therefrom.

It appears that the telephone wire ran along on Dr. Sawyer's house for some distance before entering the house; and the evidence tended to show that the force which killed Dr. Sawyer passed over this wire into the house without injury to the wire in that vicinity, and without injury to the house. There were no marks to indicate that lightning had entered the

house, or that it had been in the immediate vicinity, except the marks on Dr. Sawyer's body and slight marks on the carpet, paper and floor under the chair in which Dr. Sawyer was sitting at the time of his death. There was evidence tending to show that lightning, when upon a telephone wire, will go to earth on the first ground connection that it comes to; that when such lightning as entered Dr. Sawyer's house and there killed him, gets upon a telephone line and passes over the wire without injury to the wire, it may be conducted to earth, by known and approved appliances for that purpose, without injury to persons or property; and that, if the defendant's line at Dr. Sawyer's house had been protected by such appliance and had been properly grounded, the force which killed him would have gone to the earth over such ground connection instead of jumping from the line and passing to earth through Dr. Sawyer's body. In this connection and by this evidence, issues of fact for the consideration of the jury were presented. It was for them to find what force passed over the defendant's telephone line to Dr. Sawyer's house and there killed him, and to find the extent of that force.

When the jury had found what the force was and its extent, it was for them to say whether there were known and approved appliances for arresting, diverting and controlling such force so as to prevent injury; and whether the defendant was negligent in not providing such appliances; and whether the deceased came to his death by reason of such neglect.

Upon the question of contributory negligence, the evidence was not so decisive one way or the other as not to leave a reasonable doubt or room for opposing inferences. As we have seen, the character of the business in which the defendant was engaged, and its undertaking to maintain an instrument in Dr. Sawyer's house for his use, were such that it was under a duty to exercise the care of a prudent man in like circumstances, in selecting, placing and maintaining, in connection with its wires and instruments, such known and approved appliances and ground connections as were reasonably necessary to guard against accidents

from lightning striking its telephone line and passing along its wires. The evidence tended to show, that a telephone line, by the use of known and approved appliances, and by proper ground connections, may be so constructed that the telephone instruments will be comparatively safe; that there were no such appliances or connections at or near Dr. Sawyer's house that were intended, in their then condition, to guard against accidents from such lightning as the evidence tended to show killed Dr. Sawyer; that there was a plug with the instrument, which was intended to be inserted between the plates on the top of the instrument, for the purpose of cutting the current of electricity out of the instrument; and that, just before Dr. Sawyer was killed, his daughter placed this plug between the plates, but there was no ground connection, and the hole under the plates was too small to receive the plug, and, by reason of these defects, it did not serve the purpose for which it was intended. There was also evidence tending to show that the storm came on without much warning. One witness, at least, testified, "It seemed to come up sudden." Upon this evidence, it was for the jury to say whether the deceased knew, or ought to have known, that the instrument was not provided with proper appliances and ground connection to guard against injurious effects from lightning when conducted to his house over the defendant's telephone line; whether a prudent man, in like circumstances, would have assumed that the defendant had done its duty in these respects, and omitted to inquire or investigate for himself; whether the deceased knew, or ought to have known, that a storm was approaching: and whether he knew, or ought to have known, of any facts that would have warned a prudent man in like circumstances of approaching danger and caused him to take measures for his safety by going to some other place, or doing something that was omitted by the deceased. The facts, circumstances and surroundings which the evidence tended to show were such that fair minded men might reasonably draw different conclusions, and were such, when considered in the light of the common and extensive use of telephones,

and the manner and place of using them, that a fair minded man might reasonably say that the deceased, at the time he came to his death, was intently reading in his library, wholly unconscious of the danger to which he was exposed; and that, in this, he was doing as a prudent man, under like circumstances, would be very likely to do. The question of whether the deceased was in the exercise of due care was for the jury.

Judgment affirmed.

ANSEL C. BOYD v. HENRY DOUGLASS.

May Term, 1900.

Present : TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON, and WATSON, JJ.

Opinion filed November 30, 1900.

Fixtures—What ordinarily removable by tenant, immaterial when lease is decisive

—When a tenant is precluded from removing a fixture by the character of the lease under which he holds the demised premises, facts from which an intention to remove existing at the time of the annexation of the fixture might otherwise be presumed, and which might otherwise make the fixture removable by the tenant, are immaterial.

*Building as a fixture—When not removable by a tenant—*A building, erected by a tenant on the demised premises pursuant to a covenant in the lease, is not removable by him unless the lease gives him a right to remove it.

*Building as a fixture—Construction of lease requiring erection of building and reserving no rent—*A building was not removable by a tenant which was erected by him on the demised premises under a lease for five years, which reserved no rent, but required the erection of the building within one year on pain of forfeiture, and which gave no right of removal.

TRESPASS, to determine the right of a tenant to remove a certain building from premises in question. Trial by court,

Windham County, March Term, 1900, *Start*, J., presiding. By agreement of counsel the facts were found and filed by the presiding judge in vacation. Judgment on facts found for the defendant to recover his costs. The plaintiff excepted.

The lease in question, the terms of which are sufficiently set out in the opinion, was dated and recorded June 27, 1896. Thereafter the building in question was erected on the demised premises by the lessee under his lease. On the 19th day of October, 1899, the plaintiff was in possession of the premises by virtue of a warranty deed from the lessor, and on that day the defendant, acting under the direction of the lessee, entered upon the premises for the purpose of moving the building therefrom and was attempting to do so when the plaintiff notified him to desist and this suit was brought. The suit was brought for the purpose of determining the ownership of the building and the plaintiff on trial claimed only nominal damages.

Charles S. Chase for the plaintiff.

Arthur P. Carpenter for the defendant.

MUNSON, J. If the nature, purpose and manner of annexation of the building in question are such as would ordinarily make it removable by the tenant, the defendant is nevertheless precluded from removing it by the character of the lease. The lease is for five years without reservation of rent, requires the erection of a specified building in one year on pain of forfeiture, and gives no right of removal. The building erected under this lease cannot be treated as a removable fixture. A tenant's right of removal rests upon the ground that the fixture is annexed for his own benefit, and not to enhance the value of the freehold. An intention to remove it is presumed to exist at the time of annexation, and this intention is held to prevent its becoming inseparably connected with the realty. But there is no room for these considerations when the demise stands upon a condition which requires the annexation. The only intention which can then be recognized is that evidenced by the agreement.

The facts from which a contrary intention would be deduced in the absence of such an agreement are made immaterial by its existence. In whatever manner the fixture may be annexed, the lessee will have no right to remove it, if the lease requires its annexation, and affords no indication that the connection was intended to be temporary. A building erected by a tenant on the demised premises pursuant to a covenant in his lease is not removable, unless the lease gives him a right to remove it. 13 A. & E. Ency. Law. 2d. ed. 660; *Dean v. Hutchinson*, 40 N. J. Eq. 83; *Price v. Grice*, 92 Va. 763; *Gett v. McManus*, 47 Cal. 56; *New York v. Brooklyn Fire Ins. Co.* 41 Barb. 231.

Judgment reversed and judgment for plaintiff for one cent damages and costs.

TOWN SCHOOL DISTRICT OF BRATTLEBORO v. SCHOOL DISTRICT NO. 2 OF BRATTLEBORO.

May Term, 1898.

Present : TAFT, C. J., ROWELL, MUNSON, START and THOMPSON, JJ,

Opinion filed November 30, 1900.

Construction of statutes—School law—No. 130, Acts of 1890, not repealed by No. 5, Acts of 1890—No. 130, Acts of 1890, approved November 20, 1890, giving validity within the Brattleboro Graded School District to teachers' certificates granted by the prudential committee of that district, and providing that the district should receive the same share of the public money or school fund as before the passage of the act, was not repealed by No. 5, Acts of 1890, approved November 20, 1890, which provided that no person, other than the principal teacher of the highest department of a graded school, should teach a public school without having a certificate or permit from the county examiner, and which in terms repealed all acts or parts of acts inconsistent therewith.

*The conclusion justified by recognized rules of statutory construction—Presumption as to acts passed at the same session—*A repealing clause, which does not in terms refer to local and special laws, may be held to relate to general laws only, and this principle is especially applicable to acts passed at the same session. Acts passed at the same session are to be construed, if possible, so as to give effect to each, as it is not to be supposed that the Legislature intended that they should repeal one another.

*The language of the earlier act and that of the repealing clause of the later afford some indication that the two acts were intended to stand together—Legislative journals in aid of construction—*References to the legislative journals of the session of 1890 are made for such light as they afford upon the question of construction under consideration, and from what they show it is fair to infer that possible modifications of the general law at that session were in the mind of the Legislature when No. 130 was passed. In this view some significance is to be attached to a provision of No. 130, that no public or general law should be so construed as to conflict with the provisions of No. 130. While this could not operate as a restriction upon further legislative action, it may properly be considered in ascertaining the intended scope of the repealing clause of Act No. 5, subsequently passed.

*Constitutional law—No. 130, Acts of 1890, is constitutional—*No. 130, Acts of 1890, is not repugnant to article seven of the Bill of Rights. The legislature may confer upon cities, villages, and school districts, diverse privileges and powers without infringing the principle that government is instituted for the common benefit of the community and not for the particular advantage of a part of it.

*Construction of statutes—Meaning of language employed determined by manifest purpose of enactment—Share of Brattleboro Graded School District in public money determined by general law at time of division—*The provision of No. 130, Acts of 1890, that the Brattleboro Graded School District shall receive the same share of the public money "as before the passage of this act" means only that its proportionate share of the public money shall be unaffected by the act, as is shown by the manifest purpose of the enactment. The public money of the Town of Brattleboro is to be divided in accordance with the general law in force at the time of the division.

*V. S. 848 provides the only method of division of public money known to the present law—*By the school law of 1888, a graded school district in a town not having the town system of schools had its share of the public money determined on the basis provided by section 234, and a graded school district in a town having the town system had its share determined

upon another basis provided by section 141. By No. 20, Acts of 1892, all towns were given the town system, the act containing a provision that incorporated school districts should in no way be affected by the provisions of that act. Assuming that this provision as originally enacted applied to the division of public money, and required that a graded school district, in a town which did not previously have the town system, should have its share of the public money determined in accordance with said section 234 which was not then expressly repealed, still the kindred provision in the revision of 1894 can have no such application, for that revision expressly repealed the entire school law of 1888 and did not re-enact section 234. Since the revision of 1894 took effect the only method of division of public money known to the law is that provided by V. S. 848.

Practice in the Supreme Court—Suggestion of oversight—Motion for re-hearing—

The procedure in this case, on a suggestion of oversight and of a desire for a re-hearing, may be noted.

CHANCERY. Heard upon bill and supplemental bill and answers thereto, Windham County, September Term, 1897, *Ross*, Chancellor. Decree in accordance with the prayer of the bill. The defendant school district appealed.

The bill and supplemental bill were filed respectively May 29, 1897, and August 20, 1897, and set out that the selectmen of the Town of Brattleboro were threatening to divide the public school money then in the treasury of said town between the town school district and the Brattleboro Graded School District upon the basis of the aggregate attendance of scholars, and prayed for an injunction. The Brattleboro Graded School District and the selectmen of the town were made defendants.

After the delivery of the opinion of the Supreme Court proceedings were taken by the orator for a further hearing upon its claim that No. 130, Acts of 1890, was repealed by No. 5, Acts of 1890, and upon the question as to what was the general law determining the division of said public money at the time in question.

Waterman, Martin & Hitt for the orator.

Clarke C. Fitts, Haskins & Schwenk and *L. M. Read* for the defendant district.

MUNSON, J. It is provided by No. 130, Acts of 1890, approved Nov. 20, 1890, that certificates of qualification granted by the prudential committee of the Brattleboro graded school district shall have the same validity within that district as if granted under the provisions of the "present school law," and that the district shall receive the same share of the public moneys or school fund as before the passage of the act. The plaintiff district claims that this act was repealed by No. 5, Acts of 1890, approved Nov. 26, 1890, which provides that no person, other than the principal teacher of the highest department of a graded school, shall teach a public school without having the certificate or the permit therein provided for, and which in terms repeals all acts or parts of acts inconsistent therewith.

It is true, as claimed by the orator, that Act No. 5 was presented by the committee as a new bill, and did not come before the houses until after No. 130 had become a law. But various bills repealing or radically changing the existing law had been introduced early in the session and referred to committees, and it is fair to infer that possible modifications of the general law at that session were in the mind of the legislature when No. 130 was passed. In this view the further provision of that act, that no general and public law should be so construed as to conflict with its provisions, is of some significance. While this could not operate as a restriction upon further legislative action, it may properly be considered in ascertaining the intended scope of the repealing clause subsequently enacted.

The comprehensive language of the repealing clause does not preclude such an inquiry, for a repealing clause which does not in terms refer to local and special laws may be held to relate to general laws only. A special authority conferred by the legislature is not necessarily affected by general legislation on the subject. The two may stand together; one as the general law of the land, the other as the law of the particular case. *State v. Stoll*, 17 Wall. 425. This view is especially applicable to acts passed at the same session, for it is not to be supposed that

the legislature intended that acts thus passed should abrogate and repeal one another. *Neill v. Keese*, 5 Tex. 23:51 Am. Dec. 746. Consequently it is an established rule that acts passed at the same session are to be so construed, if possible, as to give effect to each. This rule applies to, and may control, the construction of a clause of express repeal; so that if there is an apparent intent to give the clause a qualified or limited operation, that intent will prevail over the literal and unqualified sense of it. Endl. on Int. of Stat. sec. 43 note. We think the recognized rules of statutory construction justify the conclusion that No. 5 was not intended to repeal No. 130.

But the plaintiff claims further that the special act in question is repugnant to the seventh article of our Bill of Rights, in that it permits the district to share in the public money without having its schools taught by teachers whose qualifications have been ascertained by the examination to which other teachers are subjected. The provision referred to is in substance that government is instituted for the common benefit of the community, and not for the particular advantage of a part of it. Doubtless the same effect is to be given to this provision that is given the requirement found in other state constitutions, that laws shall be general and for the equal benefit of all. But these provisions have never been understood to require that the same privileges be given to all municipal corporations of the same kind. Municipal corporations are agencies of government, and as such are peculiarly susceptible of legislative control. *Cooley Cons. Lim.* 389; *Williams v. Eggleston*, 170 U. S. 304. School districts are agencies of this character, created to maintain the public schools required by the Constitution. *Cons. Vt. Chap. II. sec. 41*; *Williams v. School District*, 33 Vt. 271; *Town of Barre v. School District*, 67 Vt. 108. The State is no more bound to establish a uniform system in the case of school districts than it is in the case of cities or villages. It can delegate more of its power to one municipality than to another, and vary its regulations in recognition of the different conditions and necessities of different localities. It is for the

legislature to say whether fewer or other safeguards than those elsewhere required are adequate to secure a proper use of the public moneys in the defendant district.

It appears then that the schools of the defendant district are such as entitle it to draw public money. But the orator claims that if Act No. 130 is in force, the division of public money must be in accordance with the law existing at the time of its passage, and not pursuant to provisions subsequently enacted. This claim is based upon the provision that the graded school district shall receive the same share of the public money as before the passage of the act. But the more obvious meaning of the language must yield to the manifest purpose of the enactment. Encl. sec. 295. The purpose of the legislature was not to secure to the Brattleboro districts a continuance of the existing method of division regardless of future changes, but to secure to the graded school district its proportion of the public money notwithstanding its want of the certificate which the general law made a condition of participation. We think the public money of the town of Brattleboro is to be divided in accordance with the general law in force at the time of the division.

Decree reversed and cause remanded with mandate that the bill be dismissed with costs.

Upon the delivery of the above opinion the solicitors for the orator suggested that certain material matters appeared to have been overlooked in the consideration of the case, and asked that the mandate be withheld to enable them to bring those matters to the attention of the court. The case was thereupon entered "with the court"; and in the vacation following the orator had leave to file a motion for a re-hearing embodying a statement of the grounds relied upon, and was directed to give a copy thereof to defendant's solicitor, who had leave to file objections to the granting of such motion. Upon the papers submitted under these orders, the court considered whether further hearing should be granted.

The point made in regard to the repealing clause will not be entertained as a ground of re-hearing, for the effect of that clause was not overlooked in disposing of the case, as clearly appears from the opinion.

It is true, as surmised by counsel, that the court assumed; without special consideration, that the result arrived at required a division in accordance with the provisions of V. S. 848. The motion is therefore entertained upon the second point made; but, upon consideration of the grounds set forth in its support, we are satisfied that the court was right in its assumption, and that a further hearing is unnecessary.

Sections 234-5, No. 9, Acts of 1888, provided that a part of the public money should be divided among the school districts of each town equally, and the remainder in proportion to the aggregate attendance; while sec. 141 provided that a graded school district in a town having the town system should share in all the public money upon the latter basis. Section 1, No. 20, Acts of 1892, made each town a single school district, but provided that incorporated districts should in no way be affected by the provisions of that act. The provisions of secs. 234-5 remained applicable to Brattleboro until the passage of No. 20, Acts of 1892, for it did not have the town system until given it by that act; and it is claimed that the graded school district will be favorably affected by the act unless the method of division established by secs. 234-5 is retained. If it be true that the orator remained entitled to this division under the act of 1892, it certainly has not been entitled to it since the revision of 1894 went into effect. It may be that the mere re arrangement of these statutes as shown in secs. 664-5 and secs. 848-9 in chapters 36 and 45 of the revision, would not alter their effect; but this re-arrangement was accompanied by an express repeal of No. 9, Acts of 1888, without a re-enactment of the provisions of sec. 234. Conceding to the exception as originally enacted the effect claimed, it cannot have that effect as embodied in the re-

vision in connection with this repeal. The only method of division known to the present law is that given in V. S. 848.

Motion overruled.

HELEN B. CLARK v. EMPLOYERS' LIABILITY ASSURANCE COMPANY.

October Term, 1897.

Present : ROSS, C. J., TAFT, ROWELL, MUNSON, TYLER and THOMPSON, JJ.

Opinion filed November 30, 1900.

*Ascertainment of facts by evidence wholly circumstantial—Legitimate scope of inquiry—Reception of evidence not rendered error by ultimate development of immateriality—*It being necessary in a suit on an accident insurance policy to ascertain the cause of the death of the insured from evidence wholly circumstantial, it was proper to receive evidence of every fact that entered into the situation at the time of the catastrophe, and if it ultimately appeared that some such facts were so controlling as to make it certain that other attending circumstances, of which evidence was received against objection, had nothing to do with the catastrophe, error could not be attributed to the court in having permitted the inquiry to take the range above indicated.

*Evidence by deposition—Exclusion of irresponsible hearsay not specifically objected to—*It appearing from a deposition that a part of an answer was not responsive to the question put and was hearsay, it was proper on trial to exclude so much of the answer as appeared to be hearsay, although no specific objection was made thereto at the taking of the deposition.

*Admissibility of a party's evidence must be apparent when offered—*Evidence which might have tended to show that an ancestor of the insured did not die of heart disease had no tendency when standing alone to show that he did die of apoplexy, and such evidence offered when there was no evidence in the case as to the manner of the ancestor's death was properly excluded.

*Examination of witnesses—Unnecessary embodiment of irrelevant and prejudicial matter in a question—*It is improper in questioning a witness to assume or state a fact which is unnecessary to the inquiry and which is irrelevant and prejudicial.

*Parties to actions—Action on insurance policy—Beneficiary may sue—*When the undertaking in an insurance policy is to pay to a beneficiary named, the beneficiary may maintain a suit on the policy.

*Motion for verdict on the whole evidence overruled—*There being evidence in this case tending to sustain the plaintiff's declaration, a motion for a verdict in favor of the defendant on the whole evidence was properly overruled. The evidence so tending is reviewed in the opinion.

*Cause of action to be proved as alleged—*In an action on an accident insurance policy the plaintiff cannot recover on proof that the insured's death resulted from an accident substantially different from the one set out in the declaration.

*Unnecessary allegation of relevant matter to be proved—*In an action on an insurance policy matters material and relevant to the injury received must be proved as alleged, although they were unnecessarily alleged. It is only when matter unnecessarily alleged is wholly foreign and irrelevant to the cause of action or is repugnant to what has gone before that it can be rejected as surplusage.

*Rule applies to matter alleged under a restrictive or explanatory videlicet—*The necessity of proof of material matters alleged is not affected by the fact that they are alleged under a videlicet that is merely restrictive and explanatory of a preceding general allegation, and not in any way inconsistent with it.

*Relevant and consistent allegations under a videlicet traversed by the general issue—*The general issue is sufficient to traverse and put in issue any unnecessarily particular averments of relevant and consistent matter alleged under a videlicet.

*Construction of insurance contract—"Indirectly" not synonymous with "partly"—*In an accident insurance policy which does not insure against death occasioned wholly or partly, directly or indirectly, by disease, the right of recovery is narrowed by the use of the word indirectly.

*Evidence ground for opposing inferences of fact—Right to instruction applicable to facts found established—No waiver by not objecting for variance—*The plaintiff's evidence, wholly circumstantial, being such as to afford ground for opposing inferences as to whether the insured's death resulted from an injury received in the manner alleged in the declaration, or from an injury received in a different manner, the defendant, by not objecting to the evidence on the ground of variance, did not waive the right to have the jury instructed to the effect that the plaintiff could not recover if they found that the insured died from an injury received in a different way from that alleged in the declaration.

*Death caused directly and wholly by external violence may be indirectly caused by disease—*If, as some of the evidence tended to show, the insured, in conse-

quence of spontaneous apoplexy, fell before an approaching wagon, and, while in a helpless condition so caused, was crushed to death by its wheels, his death was caused indirectly by the apoplectic stroke, although it was caused directly and wholly by the crushing.

GENERAL AND SPECIAL ASSUMPSIT, in which the plaintiff as beneficiary sought to recover upon a policy of accident insurance upon the life of Barma A. Clark, her husband. Pleas, the general issue and a special plea setting out that the insured came to his death from spontaneous or natural apoplexy. Trial by jury, Windham County, September Term, 1896, *Start, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

On September 30, 1895, the dead body of the insured was found lying in a highway in the Town of Brattleboro. When last seen alive he was apparently in good health and was about starting upon a drive with a loaded team. The evidence as to his death was wholly circumstantial.

The result of an autopsy on his body was given in evidence, and the expert testimony of physicians was introduced by both parties. There was evidence of apoplexy, the plaintiff claiming that the apoplexy was the result of an injury, was traumatic apoplexy, and the defendant claiming that the apoplexy was not caused by any injury but was natural or spontaneous apoplexy.

The evidence introduced by the defendant tended to show that the mother of the insured died from apoplexy and that a brother of the insured had suffered an apoplectic shock from which he afterwards recovered. The defendant introduced in evidence the deposition of Dr. Daniel Campbell, one question in which was "Whether you remember the occasion of his [the insured's] maternal grandfather's death?" The answer was: "That would be Atherton Hall. Yes, I remember he had no physician, he went out to milk one morning and was gone longer than usual and was found dead in the yard." The court excluded that part of the answer following the word "Yes." The deponent testified that he had been Atherton Hall's family physician,

and was asked the question, "Whether you ever knew of his having had any heart trouble?" His answer was "No." This question and answer were excluded.

At the close of the evidence the defendant moved that a verdict be directed in its favor for that upon the whole evidence the plaintiff was not entitled to recover.

The defendant excepted to the failure of the court to comply with certain of its requests to charge and to the charge as given with respect to the subject matter thereof. These requests and the portion of the charge material to the exceptions appear from the opinion.

Waterman, Martin & Hitt and Kittredge Haskins for the plaintiff.

John Lowell and Clarke C. Fitts for the defendant.

MUNSON, J. The insured was found lying dead in the road, where the wheels of his wagon had evidently passed over his neck. He was seen by no one from the time he started until after his death, and his movements could be ascertained only from evidentiary circumstances. There was a watering-trough beside the road he had passed over, placed at a level which required the unchecking of a horse to enable it to drink. The body was found about twenty feet from this trough, and the horse a short distance further on. There were tracks which indicated that the horse had been brought up to the trough, and that the deceased was upon the ground at that point. There was also evidence of tracks leading from the vicinity of the trough to the location of the body, along that side of the road on which the trough stood, and a little way from the tracks made by the horse. There was nothing in the position or character of the tracks, as described by the witnesses, that indicated haste or struggle. The body lay upon its back, with feet extended toward the highway ditch. The horse was checked up when found, but the case discloses nothing as to the position of the reins.

In connection with these matters the court permitted the plaintiff to show that the horse had a habit of starting off suddenly after stops of the character indicated, and that it was hard-bitted. The defendant insists that the tracks and the position of the body, as located by undisputed testimony, left no room for an inference that the insured's fall was caused by his horse, and that consequently this evidence as to the horse should have been excluded. If the question were to be passed upon as presented by counsel, it would doubtless be held that the circumstances referred to were neither developed with such precision, nor of a character so controlling, as to require the exclusion of other circumstances having a natural connection with the fact to be proved. But we think the defendant is not entitled to put the question upon this narrow ground. The cause of the insured's death was to be ascertained from evidence entirely circumstantial. The jury were entitled to the aid of every fact that entered into the situation of the deceased at the time of his catastrophe. The scope of legitimate inquiry included, not only the strength and activity of the man, the steepness of the grade, the character and condition of the surface, the style of the wagon and the amount of the load, but the disposition and habits of the horse in matters affecting its conduct and management under such circumstances. These facts were all material to the inquiry; and the admission of any of them against the defendant's objection could not put the court in error, even if it ultimately appeared that some of the others were so controlling as to render it certain that those objected to had nothing to do with the catastrophe.

The court properly excluded so much of Dr. Campbell's answer to interrogatory five as related to the manner of Atherton Hall's death. It is fairly apparent from the answer, especially when read in connection with other parts of the deposition, that it was hearsay. But counsel contend that if there was any uncertainty in regard to this, the adverse party should have called attention to it at the time of taking by a specific objection,

so that the uncertainty could have been removed by further inquiry. We think, however, that it was the duty of the party taking the testimony to see that enough appeared to show its competency, and that a specific objection before the magistrate was not required to entitle the plaintiff to raise this question on trial.

The question as to Atherton Hall's having had any heart trouble called for a matter of fact and not of opinion; and it is possible that the mere fact that the family physician did not know of his having had heart disease was evidence tending to show that he did not have it. But it is not necessary to inquire as to this; for the fact that Atherton Hall did not die of heart disease was not material, unless the circumstances were such that proof that he did not die of heart disease would tend to show that he died of apoplexy; and the previous answers as to the manner of his death having been excluded, it was not error to exclude this. It does not appear that there was any evidence then in the case as to the manner of Atherton Hall's death.

One Childs testified to a conversation had a few days after the insured's death with William B. Clark, a son of the deceased and a witness for the plaintiff, in which Clark spoke of his father's having recently had dizzy spells and trouble with his head. Childs was an insurance agent, representing companies which had risks on the deceased; and he was cross-examined at some length for the purpose of showing his interest. In the course of this examination, he was asked if he did not take an active part in the matter from the time of the insured's death until the time of the trial, or until his company settled. Upon objection being made the question was withdrawn, whereupon an exception was noted to the asking of the question; and it is now objected that the last clause of the question embodied an inadmissible fact, the use of which was altogether unnecessary to the purpose of the examination. It is, in truth, difficult to see how it became necessary to make use of this fact in showing the interest of the witness. Plaintiff's counsel insist that the question was harmless

because it did not indicate whether the interest of his company was by way of an accident policy or a life policy. But in a later stage of the cross-examination questions were asked which tended strongly to solve the doubt. The court has heretofore indicated its purpose that cases shall not be tried upon irrelevant and prejudicial matters improperly brought before the jury by question or argument. It is doubtless true that the objectionable features of questions of this character are sometimes due to inadvertence, and that this must be taken into consideration in determining the proper application of the rule to an exception of this character. But as the case stands it is not necessary to consider the matter further.

The defendant's motion that a verdict be directed in its favor, for that upon the whole evidence no right of recovery was shown, was properly overruled. It is claimed, first, that the evidence excludes the possibility that the insured's fall was caused by his horse. It is said that the position of the body and the location of the tracks show conclusively that he was not struck by the horse or shaft. But if this be conceded, it does not follow that the horse had no connection with the fall; and the allegation that the deceased was cast or thrown upon the ground did not confine the plaintiff to proof of a direct blow. In the absence of any evidence as to the reins, they may be presumed to have been left as reins are usually left under such circumstances. The evidence that the tracks of the deceased were a little way from those made by the horse did not preclude the possibility that as the horse was leaving the vicinity of the trough the deceased seized the nearest rein at some point alongside the horse, and that this connection was maintained until he fell. In view of this, it cannot be said to have been impossible for a reasonable man to conclude from all the evidence that the insured's fall was due to some movement of his horse.

It is also claimed that the evidence does not show a right of action in the plaintiff. The defendant is not entitled to raise this question under his general motion, but it may properly be

disposed of in view of the necessity of another trial. The undertaking of the policy is to pay the principal sum to the plaintiff, and this entitles her to maintain the suit. *Davenport v. Northeastern Mutual Life Assn.* 47 Vt. 528.

The declaration alleges that the insured's death "resulted from bodily injuries alone, and through external, violent and accidental means, to wit: that he was accidentally cast or thrown upon the ground by his team so that the back of his head near the base of the brain struck on the hard earth or stone with great force, and the wheels of his heavily loaded wagon passed across his neck and chest, so that by means of said accidental bodily injuries solely, and from no other cause, his death was then and there caused." The defendant's first request was for a charge that the plaintiff could not recover unless the jury found that the "insured came to his death solely through external, violent and accidental means, and from bodily injuries alone, received in the particular manner and upon the particular parts set forth in the declaration;" the request concluding with the words of the videlicet. The fifth request was "that the plaintiff cannot recover if the jury find that the insured came to the ground in any other way than by being cast or thrown there by his team, although they find that his death was thereafter caused by his wagon running over him." The defendant, if entitled to the substance of the first request, was probably not entitled to a charge in its exact language, for it would be sufficient if the injuries were received substantially as alleged. But the fifth request presents the question argued, and is not open to this verbal objection. Neither request was complied with.

The defendant is not precluded from relying upon these requests by the fact that the evidence was not objected to, nor by the fact that the language used did not present the matter in the light of a variance. The failure to object was not a waiver, for the circumstantial evidence offered had some tendency to establish the allegations of the declaration when given the legal effect

claimed by the defendant. The real contention is not that the allegations were wholly unsupported, but that the charge permitted the jury to return a verdict for the plaintiff without finding them established. The requests were designed to secure an instruction that would preclude the return of a verdict for the plaintiff, unless the jury found the facts which the defendant claimed were essential to a recovery. The question raised is whether the plaintiff could recover upon proof that the insured's death resulted from an accident different from the one set forth in the videlicet.

It was sufficient for the plaintiff to allege that the insured's death resulted solely from bodily injuries, sustained through external, violent and accidental means, without setting out the particulars of the accident which caused his fatal injuries. But those particulars, although not necessary to be alleged, were material to the inquiry; and if particulars thus material are unnecessarily alleged, they must be proved substantially as stated. It is only when the matter unnecessarily stated is wholly foreign and irrelevant to the cause, or is repugnant to what goes before, that it can be rejected as surplusage. The pleader cannot relieve himself from the necessity of proving unnecessary allegations of relevant matter by putting them under a videlicet. The proper office of a videlicet is to particularize or explain what goes before it. It may restrain the generality of preceding words, but cannot enlarge nor diminish the preceding subject-matter. In the former case it is merely explanatory of the language which precedes it, while in the latter it is repugnant to it. When a material videlicet is preceded by words of direct averment, the videlicet is regarded as a direct allegation, and therefore as traversable; and being regarded as traversable, it follows that if traversed it must be proved. Gould, Plead. ch. 3. secs. 35-41; 1 Chitt. Plead. 228, 229, 317, 318, 392, 611. *Der- ragon v. Rutland*, 58 Vt. 128 (135); *Stukely v. Butler*, Hob. 175; *Knight v. Preston*, 2 Wils. 332; *Gleason v. McViker*, 7

Cow. 41; *Hastings v. Lovering*, 2 Pick. 214; 2 Saund. P. II. 291 a.

The videlicet in this case is merely restrictive and explanatory of the preceding general allegation, and is in no way inconsistent with it. It is an unnecessarily particular statement of relevant matter, and not a statement foreign to the inquiry. In connection with the preceding general averment, it sets forth that the insured's death resulted from bodily injuries caused by his being accidentally thrown upon the ground by his team. The matter is such that it makes one complete and consistent allegation, and the plaintiff's claim that the general issue traversed only the matter contained in the general averment cannot be sustained. The plaintiff could not recover under this declaration without showing that the deceased was thrown to the ground by his team; but this being established, she could recover whether death was caused by a blow from the team, by the concussion of the fall, or by the crossing of the wheels substantially as alleged. This statement renders a specific reference to the second, third and fourth requests unnecessary. The failure of the court to confine the jury to the allegations of the declaration requires a reversal of the case.

The remaining question involves a construction of the policy. The policy did not insure against death occasioned wholly or partly, directly or indirectly, by disease or bodily infirmity. The defendant requested a charge that the plaintiff could not recover if the death was caused wholly or partly by disease or bodily infirmity, and this was complied with. The defendant also requested a charge that the plaintiff could not recover, even if the death was found to have been caused by accident, if it was also found that disease or bodily infirmity contributed in any degree thereto. This request was apparently framed to secure an instruction upon the phrase "directly or indirectly," but it may be doubted whether the word "degree" was such as to give it the force intended. If not, the question as to the effect of the words "directly or indirectly" was

not saved. But the request has been treated as presenting this question, and under the circumstances it may properly be given that effect without further examination.

The court stated the inquiry to be whether the deceased died solely by reason of the injuries received by the accident—whether the accident was the direct cause of the death; referred to the plaintiff's claim that the apoplexy causing the death was produced by the accident, and to the defendant's claim that the apoplexy was the result of natural causes; and charged that the plaintiff must show that an accidental injury was the direct cause, or the sole cause, of the death, and that he could not recover if the death was caused wholly or in part by disease or bodily infirmity. The request above set forth was not complied with unless a compliance can be found in this instruction.

The circumstantial evidence bearing upon the cause of the insured's death presented the question whether he was stricken with spontaneous apoplexy and fell in a place where the wheels passed over him, or whether he accidentally fell where the wheels passed over him and suffered apoplexy as a result of the injuries received. The defendant contends that if the insured fell before the wheels because of an apoplectic fit, not sufficient to cause death, and was killed by the pressure of the wheels, it might truly be said that his death was caused directly and wholly by the accident, and yet the case be within the exception of the policy. A few authorities are referred to in elucidation of this claim.

In *Winspear v. The Accidental Insurance Co.* 6 Q. B. Div. 42, and in *Lawrence v. Accidental Insurance Co.* 7 Q. B. Div. 216, the company was held liable for accidental deaths which would not have occurred but for fits of apoplexy. But the exceptions in the policies there construed did not contain the word "indirectly" nor an equivalent expression, and the reasoning advanced in support of the decisions indicates that if there had been such a provision the result would have been different. In *Manufacturers' Accident Indemnity Co. v. Dorgan* 7 C. C. A.

581, the facts presented the same situation, and the policy was like the one in suit; and upon a review of the cases above cited, it was considered that the word "indirectly" broadened the exception and required a different conclusion.

We think the view of the Circuit Court of Appeals is correct. The policy does not insure against an accidental death which is caused indirectly by disease. If the insured's fall was caused by disease, that disease was the cause of his death within the meaning of the exception. His helpless plight in the tracks of the approaching wheel was due to the apoplectic stroke, and to that alone. An accidental death by crushing is caused indirectly by disease, if the person falls in the place of danger because of disease. The death is caused directly and wholly by the crushing, but it is nevertheless caused indirectly by the disease. It was necessary for the plaintiff to show, not only that the injury received was the direct cause of death, but that disease did not indirectly cause the death by subjecting the insured to that injury. The charge failed to present this view to the jury.

Judgment reversed and cause remanded.

INDEX.

ACCEPTANCE.

Of money offered as a bribe, what constitutes. *State v. Smith*, 366.

Of drafts shown by book entries. *Post v. Kenerson*, 341.

ACTION ON THE CASE.

When case is the more appropriate remedy, although assumpsit may be maintained. *Holden v. Rutland R. R. Co.*, 156.

Facts showing a breach of contract only for which no recovery can be had in an action on the case. *Alletson v. Powers*, 417.

ACTIONS.

An action by a father for the seduction of his minor daughter does not survive. *Davis v. Carpenter*, 259.

Facts showing no cause of action. *Alletson v. Powers*, 417.

A woman may maintain an action for the alienation of her husband's affections. *Knapp v. Wing*, 334.

Action at law by foreign receiver not maintainable. *Sparks v. Estabrook*, 101. *King v. Cochran*, 107.

ACT OF GOD.

Question of, held not to be involved. *Griffith v. N. E. Telephone Co.*, 441.

AGENCY.

Of wife in sale of intoxicating liquor. *State v. Leonard*, 102.

Of assistant town clerk in delivering instruments to clerk. *Blair v. Ritchie*, 311.

Evidence of instructions conveyed through agent. *Ibid.*

Agent may testify that he followed instructions of principal. *Ibid.*

Declaration of agent when a part of the *res gestae*. *Ibid.*

Declaration of agent when not a part of the *res gestae*. *Hardwick Savings Bank v. Drenan*, 438.

Declaration of agent as to a matter to which his employment does not extend. *Ibid.*

Negligence of agent imputed to principal. *Boyden v. Fitchburg R. R. Co.*, 89.

AGREEMENTS.

See CONTRACTS.

ALIBI.

Definition of. *State v. Powers*, 168.

When established. *Ibid.*

Submission of question of alibi to the jury. *Ibid.*

ALIENATION OF AFFECTIONS.

See ACTIONS.

AMENDMENT.

When leave to amend pleadings is discretionary. *Lamoille County National Bank v. Hunt*, 337.

Of grand juror's complaint in appellate court. *State v. Brown*, 410.

Judgment on demurrer in a criminal case reversed *pro forma* that state's attorney might amend. *State v. Austin*, 46.

APPEAL.

From appraisal of land damages under No. 265, Acts of 1896. *Littleton Bridge Co. v. Pike*, 7.

Time for filing motion for an appeal from a decree rendered in vacation. *Greene v. McDonald*, 258.

Appeal without permission of court from decree dismissing a bill of foreclosure. *Martin v. Palmer*, 409.

Appeal from final decree in chancery carries up the whole case. *Sheldon v. Clemmons*, 185.

ARBITRATION.

Submission to arbitration revocable before award. *Sartwell v. Sowles*, 270.

Agreement not to revoke ineffective. *Ibid.*

ARGUMENT AND REMARKS OF COUNSEL.

Argument to be confined to the evidence. *Wood v. Agostines*, 51. *Blaisdell and Barron v. Davis*, 295.

No argument from the absence of testimony equally available to both parties. *Ibid.*

Remarks of counsel to be governed by the evidence. *Boyden v. Fitchburg R. R. Co.*, 89.

Departure in argument from position during trial when no deprivation of legal right is shown. *Blaisdell and Barron v. Davis*, 295.

Discretion of trial court in respect to arguments. *Ibid.*
Suggestion by argument of facts not in evidence. *Ibid.*
Reference to files in the case not connected with the trial. *Ibid.*
Reference to facts as within the knowledge of persons who have not testified because of incompetence. *Ibid.*
Reference to knowledge of counsel of facts not in evidence. *Ibid.*

ARREST OF JUDGMENT.

Motion in, does not reach irregularities in the jury room. *State v. Johnson*, 118.
One count good and verdict general. *State v. Smith*, 366.

ASSIGNMENT.

By heir of his expectancy. *Fuller v. Parmenter*, 362.

AUDITA QUERELA.

Jurisdiction of justice determined in an action of. *Sartwell v. Sowles*, 270.

BAIL.

Return on execution conclusive as to time of return in *scire facias* against bail. *Yatter v. Pitkin*, 255,

BANKS.

See CONSTITUTIONAL LAW, CORPORATIONS, TRUSTEE PROCESS.

BETTERMENTS.

See EJECTMENT.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BONDS.

Separate bonds of co-assignees in insolvency. *Court of Insolvency v. Alexander*, 15.
Duty of obligee to sureties on employee's bond. *Conn. General Life Ins. Co. v. Chase*, 176.
Fraud of obligee in concealing from sureties on employee's bond past dishonesty of employee. *Ibid.*

BREACH OF PROMISE.

See CONTRACTS.

BREAKING FROM VILLAGE LOCK-UP.

An offense under V. S. 5094. *State v. Dohney*, 260.

BRIBERY.

Definition of, and concrete instruction with reference to. *State v. Smith*, 366.Acceptance of money offered as a bribe. *Ibid.*

CASES.

(Specially followed, reviewed or distinguished.)

State v. Shattuck, 69 Vt. 403, followed. *State v. Richardson*, 49.*Johnson v. Irasburg*, 47 Vt. 32, distinguished. *Hoadley v. International Paper Co.*, 79.*Holcomb v. Danby*, 51 Vt. 435, distinguished. *Ibid.**Duran v. Insurance Co.*, 63 Vt. 440, distinguished. *Ibid.**Towle v. Wilder*, 57 Vt., 622, reviewed. *Hawley v. Hurd*, 122.*Nichols v. Hooper*, 61 Vt. 295, reviewed. *Ibid.**Craig v. Gunn*, 67 Vt. 92, reviewed. *Ibid.**Murtey v. Allen*, 71 Vt. 377, followed. *King v. Cochran*, 107. *Sparks v. Estabrooks*, 101.*Jones v. Ellis*, 68 Vt. 544, distinguished. *Blaisdell and Barron v. Davis*, 295.*Granite Co. v. Mulliken*, 66 Vt. 465, distinguished. *Ibid.**Warner v. Warner's Estate*, 37 Vt. 350, distinguished. *In Re Gould's Will*, 316.*Hall v. Simpson*, 63 Vt. 601, distinguished. *Mead v. Moretown*, 323.*State v. Nooks*, 70 Vt. 247, distinguished. *Knapp v. Wing*, 334.

CHANCERY.

When equity will not restrain the production of private letters. *Barrett v. Fish*, 18.The general rule that equity will enjoin the unauthorized publication of private letters recognized. *Ibid.*A threatened sale of a homestead will be enjoined. *Hyser v. Mansfield*, 71.Equity will prevent as well as remove a cloud upon title. *Ibid.*A court of equity will provide a competent support for a wife from property that comes to her in her own right, though not held to her sole use. *Curtis v. Simpson*, 232.Statutory liability of stockholders enforceable in equity by receiver. *Barton National Bank v. Atkins*, 33.

Statutory liability of stockholders enforceable in equity against estates of deceased stockholders, heirs and legatees. *Ibid.*

Assignees in insolvency of co-partnership liable as a stockholder are proper parties to a bill in equity to enforce the stockholder's statutory liability. *Ibid.*

Standing in equity of creditors of an insolvent partnership in respect to the insolvent estate of a deceased partner. *Ibid.*

Equitable interference with proceedings at law. *Delaney v. Brown*, 344.

Equitable jurisdiction original and concurrent in cases of unfair advantage in proceedings at law gained by mistake or fraud. *Ibid.*

Foreclosure on annulment of quitclaim deed and reinstatement of mortgage. *Howard v. Clark*, 429.

Foreclosure accounting by mortgagee in possession who has occupied and conveyed supposing his title absolute. *Ibid.*

Interest, permanent improvements, rents and profits and taxes paid as elements in such accounting. *Ibid.*

Motion for appeal rendered in vacation, when to be filed. *Greene v. McDonald*, 258.

Appeal from final decree carries up the whole case. *Sheldon v. Clemmons*, 185.

Practice on the overruling of a demurrer. *State v. Massey*, 210.

Discretion of the chancellor upon the overruling of a demurrer. *Ibid.*

Considerations guiding the discretion of the chancellor upon the overruling of a demurrer. *Ibid.*

Liability enforceable in equity by party to be benefited. *Congregational Society v. Flagg*, 248.

Signature of orator's solicitor a sufficient signature to a bill of foreclosure. *Martin v. Palmer*, 409.

Appeal without permission of court from a decree dismissing a bill of foreclosure. *Ibid.*

When judgment creditor must resort to chancery. *Rutland R. R. Co. v. Chaffee*, 404.

Equitable jurisdiction when remedy at law is inadequate. *Ibid.*

See INTOXICATING LIQUOR.

CHARACTER.

See EVIDENCE.

CHARGE.

Instruction more favorable than request. *Hyde v. Swanton*, 242.

Request improperly restrictive. *Ibid.*

Denial of request not applicable to the case. *Ibid.*

Instructions as to the law bind the jury. *Ibid.*

Instruction to jury to disregard the reading in their hearing from a law-book. *Ibid.*

Charge upon the subject of reasonable doubt held sufficient. *State v. Totten*, 73.

The doctrine as to inadequacy of charge without erroneous statement of legal principle. *Ibid.*

Charge viewed as a whole. *Ibid.*

Charge more favorable to excepting party than he was entitled to. *Hoadley v. International Paper Co.*, 79.

Charge as favorable to excepting party as he was entitled to. *Ibid.*

Denial of request unsound in part. *Boyden v. Fitchburg R. R. Co.*, 89.

Denial of request based on isolated fact. *Ibid.*

Denial of request immaterial under finding of the jury. *Ibid.*

Presumption as to charge not recited in full. *State v. Leonard*, 102.

Error in reception of evidence cured by charge. *Clement v. Skinner*, 159.

Cautionary instructions, discretion of court in respect to. *State v. Powers*, 168.

Submission of question of alibi in connection with main question of guilt or innocence. *Ibid.*

Correct charge as to reasonable doubt when there is evidence in support of an alibi. *Ibid.*

Inconsistent instructions. *State v. Fitzgerald*, 142.

Charge presumed to be such as the evidence required unless record shows otherwise. *Daggett v. Champlain Manufacturing Co.*, 332.

Jury to be instructed as to the legal tendency of evidence. *State v. Smith*, 368.

References to evidence. *Ibid.*

Evidence and its weight left to the jury. *Ibid.*

Appropriate statement of unquestioned law. *Ibid.*

General statement of the law and concrete instruction taken together. *Ibid.*

Substantial compliance with requests. *Ibid.*

Denial of request not applicable to the evidence. *Ibid.*

Charge giving respondent full benefit of his claim. *State v. Doherty*, 381.

Charge favorable to respondent. *Ibid.*

Question improperly submitted to the jury. *Rowell v. Estate of Lewis*, 163.

Use of appropriate illustration. *Ibid.*

Not to be inferred that illustration covers the entire case. *Ibid.*

Denial of abstract request. *Ibid.*

References to testimony fairly made. *Ibid.*

CLOUD ON TITLE.

See CHANCERY.

COMMISSIONERS.

See ESTATES OF DECEASED PERSONS. JURISDICTION.

CONSIDERATION.

See CONTRACTS.

CONSTITUTIONAL LAW.

No constitutional right to trial by jury in an appeal from a decision of commissioners on the estate of a deceased person. *Hurlburt v. Miller's Estate*, 110.

Corporations including national banks are not citizens under Art. 4, sec. 2 of the Federal Constitution. *Hawley v. Hurd*, 122.

Corporations including national banks are not citizens under section one of the Fourteenth Amendment. *Ibid.*

Corporations are persons under section one of the Fourteenth Amendment. *Ibid.*

Constitutional protection of national banks as instrumentalities of the Federal Government. *Ibid.*

The incidental discrimination made by V. S. 1306 against national banks without this state does not impair their utility as instrumentalities of the Federal Government. *Ibid.*

The statute relating to the licensing of dogs is constitutional. *State v. Smith*, 140.

Repealing statute so construed as not to impair the obligation of contracts. *Barton National Bank v. Atkins*, 33.

No. 130, Acts of 1890 relating, to the Brattleboro Graded School District is not repugnant to article seven of the Bill of Rights. *Town School District v. School District No. 2*, 451.

CONSTRUCTION OF STATUTES.

Repeal by implication. *Barton National Bank v. Atkins*, 33.

Repealing act so construed as not to impair the obligation of contracts. *Ibid.*

When popular meaning of words will prevail over the technical sense. *Mitchell v. Blanchard*, 85.

Construction of the word "descends" as used in V. S. 2613. *Ibid.*

Construction of the word "salary" as used in an amendment to the charter of Montpelier. *Montpelier v. Senter*, 112.

Retrospective legislation not favored in construction. *Ibid.*

Considerations of justice in construction of statutes. *Ibid.*

Bearing of remedial character of a statute upon its construction. *Ibid.*

A village lock-up is a place to which the provisions of V. S. 5094 are applicable. *State v. Dohney*, 260.

V. S. 5094 is not limited in its application to places of confinement established at the time of its original enactment. *Ibid.*

Construction of the act providing for recovery on an insurance contract under the general counts in assumpsit. *Wertheim v. Fidelity & Casualty Co.*, 326.

Act as construed declaratory. *Ibid.*

Retrospective effect given only as the result of clearly expressed intention or necessary implication. *Barber v. Dummerston*, 330.

"Illness" within the meaning of "accident" as used in V. S. 1667. *Delaney v. Brown*, 344.

Statute not to be enlarged by implication unless implication is necessary to make it effective. *Yatter v. Smilie*, 349.

Under V. S. 1723 there is no implication of a right to execution upon surrender by bail. *Ibid.*

No implied enlargement of V. S. 1723 is necessary to render it effective. *Ibid.*

Construction of the statute permitting a defendant in ejectment to recover for betterments. *Rutland R. R. Co. v. Chaffee*, 404.

Construction of Acts passed at the same session. *Town School District v. School District No. 2*, 451.

No. 130, Acts of 1890, not repealed by No. 5, Acts of 1890. *Ibid.*

Acts passed at the same session not presumed to repeal one another. *Ibid.*

Legislative journals in aid of construction. *Ibid.*

Manifest purpose of an enactment determinative of the meaning of its language. *Ibid.*

"As before this act" construed to mean "unaffected by this act." *Ibid.*

Under the construction necessary to be put upon the present school law, V. S. 848 provides the only method of division of public money known to the law. *Ibid.*

Construction of V. S. 3860 and 3864 as to jurisdiction of commissioners appointed thereunder. *Rutland-Canadian R. R. Co. v. C. V. Ry. Co.*, 128.

Construction of statutes permitting in general terms the exercise of the right of eminent domain. *Ibid.*

Such authority not construed to permit the taking for an inconsistent use of property already devoted to a public use. *Ibid.*

How only an implication can arise of authority to take for one public use property already taken for another public use. *Ibid.*

Construction of statute imposing personal liability upon directors of a corporation. *Farr v. Briggs' Estate*, 225.

"To" as used in V. S. 3821 construed as a word of inclusion. *Littleton Bridge Co. v. Pike*, 7.

Construction of statute exempting from taxation the capital of certain corporations. *Richardson v. St. Albans*, 1.

Construction of the phrase "the laws of this State" as used in V. S. 411. *Ibid.*

CONTRACTS.

Substance distinguished from mere form in construction of. *Rioux v. Ryegate Brick Co.*, 148.

Substantial intent the controlling consideration in construction of. *Ibid.*

Duty imposed by necessary implication upon a party to a contract. *Ibid.*

Implied covenants and promises. *Ibid.*

Reasonable time for performance. *Ibid.*

Reasonable time dependent on circumstances. *Ibid.*

Circumstances in which parties contract to be considered. *Ibid.*

Fair and just construction favored. *Ibid.*

Breach of contract which goes to the essence. *Ibid.*

Breach which operates as an external condition subsequent. *Ibid.*

Breach which entitles the injured party to be discharged. *Ibid.*

Breach which does not go to the essence. *Ibid.*

Breach compensable in damages. *Ibid.*

Mutual promises a consideration for each other. *Patton v. Cardiner Brothers*, 47.

Construction of a lease making a building a fixture. *Boyd v. Douglass*, 449.

Construction of a contract to marry unconditional as to time. *Clement v. Skinner*, 159.

Effect of agreement as to time of marriage subsequent to contract to marry, *Ibid.*

Effect upon a contract to marry within a fixed time of an indefinite extension of time. *Ibid.*

Case of no variance between a declaration on a contract to marry and the evidence. *Ibid.*

Personal liability of trustee on his contracts. *McIntyre v. Williamson*, 183.

Trustee, how relieved from personal liability. *Ibid.*

Rules determining the personal liability of agents not applicable to trustees. *Ibid.*

When statutory liability of directors is contractual rather than penal. *Farr v. Briggs' Estate*, 225.

Facts equivalent to an ante-nuptial or a post-nuptial agreement. *Curtis v. Simpson*, 232.

Contract obligation assumed by acceptance of deed. *Congregational Society v. Flagg*, 248.

Facts showing breach of contract rather than tort. *Alleton v. Powers*, 417.

Construction of contract not to engage in a particular business. *Parkhurst v. Brock*, 355.

Acts which constitute no breach of such a contract. *Ibid.*

"Business" as used in contracts in restraint of trade. *Ibid.*

Implied undertaking in respect to special knowledge and skill. *Griffith v. N. E. Telephone Co.*, 441.

Construction of accident insurance contracts. "Wholly and continuously disabled." *Bylow v. Union Casualty and Surety Co.*, 325.

Construction of accident insurance policy. "Wholly or partly, directly or indirectly." *Clark v. Employers' Liability Assurance Co.*, 458.

CONTRIBUTORY NEGLIGENCE.

SEE NEGLIGENCE.

CORPORATIONS.

Corporations as citizens. *Hawley v. Hurd*, 122.

Corporations as persons. *Ibid.*

What corporations are not persons within the jurisdiction of this State. *Ibid.*

National banks as instrumentalities and agents of the Federal Government. *Ibid.*

Exemption from taxation of capital of corporation exempts shares of stock. *Richardson v. St. Albans*, 1.

The statutory liability of stockholders enforceable in equity. *Barton National Bank v. Atkins*, 33.

Statutory liability of stockholders enforceable in equity by a receiver. *Ibid.*

Enforcement of statutory liability of stockholders against the estates of deceased stockholders and against heirs and legatees. *Ibid.*

Enforcement of statutory liability of stockholders against the estate in insolvency of a partnership liable as a stockholder. *Ibid.*

Statutory liability of stockholders follows the stock. *Ibid.*

Statutory liability of directors. *Farr v. Briggs' Estate*, 225.

When statutory liability of directors is contractual rather than penal. *Ibid.*

When right of action to enforce statutory liability of directors is transitory. *Ibid.*

How statutory liability of directors is contractual. *Ibid.*

COSTS.

In prosecutions for habitual truancy payable by the State. *Fay v. Barber*, 55.

Allowed against a petitioner who had failed in his main contention. *Rutland-Canadian R. R. Co. v. C. V. Ry. Co.*, 128.

In Supreme Court when neither party entirely prevailed on an appeal from the Court of Chancery. *Congregational Society v. Flagg*, 248.

Petition for a new trial dismissed with costs to the petitioner, his contention prevailing through a remittitur. *Fletcher v. Fletcher's Estate*, 268.

CRIMINAL LAW.

Concessions by respondent on trial for a misdemeanor. *State v. Waite*, 108.

When an alibi is established. *State v. Powers*, 168.

Evidence tending to show an alibi considered in connection with the main question of guilt or innocence. *State v. Powers*, 168.

Breaking from a village lock-up an offense under V. S. 5094. *State v. Dohney*, 260.

Person arrested as intoxicated may be detained in a village lock-up. *Ibid.*

Production of private letters for purposes of public justice. *Barrett v. Fish*, 18.

Perjury may be committed in a trial on an insufficient indictment. *State v. Rowell*, 28.

An indictment for perjury held bad for uncertainty. *Ibid.*

One cannot be punished, under V. S. 2703 and 2704, for living in this State under a marriage relation contracted in New Hampshire. *State v. Richardson*, 49.

Trial court may or may not compel election between counts charging the same offense. *State v. Smith*, 366.

Bribery under V. S. 5086. *Ibid.*

General verdict on trial under an indictment in two counts one of which is good. *Ibid.*

To a prosecution for keeping a dog without a license it is no defense that the dog is vicious. *State v. Smith*, 140.

Complaint for keeping an unlicensed dog held insufficient. *State v. Brown*, 410.

Complaint should state facts constituting the offense charged. *Ibid.*

Grand juror's complaint not amendable in substance in the appellate court. *Ibid.*

See EVIDENCE, HOMICIDE, INTOXICATING LIQUOR.

CROSS-EXAMINATION.

See EVIDENCE.

DAMAGES.

Elements of pecuniary loss to children from death of father. *Hoadley v. International Paper Co.*, 79.

Facts showing right to at least nominal damages. *Holden v. Rutland R. R. Co.*, 156.

Refusal of trial court to set aside verdict for excessive damages. *Sartwell v. Sowles*, 270.

Damages to owners of water powers by diversion of water. *In Re Barre Water Co.*, 413.

Return of water in the form of a city's sewage not to be taken into consideration. *Ibid.*

DEATH BY WRONGFUL ACT.

See DAMAGES.

DEBT ON JUDGMENT.

The general issue is *nul tiel record* and not *nil debet*. *Wood v. Agostines*, 51.

Proof under plea of *nul tiel record*. *Ibid.*

Extrinsic evidence inadmissible under plea of *nul tiel record*. *Ibid.*

DECLARATIONS.

See EVIDENCE.

DEBENTURE.

Definition of. *Barton National Bank v. Atkins*, 33.

DEED.

Certificate of town clerk *prima facie* evidence only. *Blair v. Ritchie*, 311.

Instructions to file but not to record. *Ibid.*

Recording in disregard of instructions. *Ibid.*

Ratification of act of recording by taking deed and paying record fee. *Ibid.*

Limitation upon retroactive effect of ratification. *Ibid.*

Rights dependent upon proof of time of ratification. *Ibid.*

Unrecorded mortgage deed without possession. *Ibid.*

Obligations assumed by acceptance of deed. *Congregational Society v. Flagg*, 248.

Conveyance by wife of her real estate without joinder of husband. *Curtis v. Simpson*, 232.

DEFINITIONS.

- "Business." *Parkhurst v. Brock*, 355.
"Cider." *State v. Waite*, 108.
"Citizen." *Hawley v. Hurd*, 122.
"Debenture." *Barton National Bank v. Atkins*, 33.
"Descends." *Mitchell v. Blanchard*, 85.
"Established." *In Re Pierpoint's Will*, 204.
"Fermented cider." *State v. Waite*, 108.
"General count." *Wertheim v. Fidelity & Casualty Co.*, 326.
"Illness." *Delaney v. Brown*, 344.
"Indirectly." *Clark v. Employers' Liability Assurance Co.*, 458.
"Overseeing." *Bylow v. Union Casualty & Surety Co.*, 325.
"Person." *Hawley v. Hurd*, 122.
"Personal estate." *Davis v. Carpenter*, 259.
"Salary." *Montpelier v. Senter*, 112.
"Suffer." *Hyde v. Swanton*, 242.
"To" used as a word of inclusion. *Littleton Bridge Co. v. Pike*, 7.
"Wholly and continuously." *Bylow v. Union Casualty & Surety Co.*, 325.

DELIVERY.

See SALES.

DISCOVERY.

See PROBATE COURT.

DISCRETION.

- Discretionary reference by County Court. *Hurlburt v. Miller's Estate*, 110.
Discretion of chancellor upon overruling a demurrer. *State v. Massey*, 210.
Discretion of state's attorney under No. 90, Acts of 1898. *Ibid.*
Discretion of trial court as to latitude of cross-examination. *Hyde v. Swanton*, 242.
As to award of certified execution. *Sartwell v. Sowles*, 270.
In respect to arguments of counsel. *Blaisdell & Barron v. Davis*, 295.
Leave to amend, when discretionary. *Lamoille County National Bank v. Hunt*, 357.
In respect to impaneling the jury. *State v. Smith*, 366.
As to latitude of re-examination. *Hyde v. Swanton*, 242.
As to setting aside verdict for excessive damages. *Sartwell v. Sowles*, 270.
In respect to election between counts. *Ibid.*

DISQUALIFICATION.

- Of judge. *Hyde Park Lumber Co. v. Shepardson*, 188.
Of justice. *Fairbanks v. Rockingham*, 419.

DIVORCE.

Construction of V. S. 2703 and 2704 in respect to marriage of the guilty party. *State v. Richardson*, 49.

DOGS.

Keeping a dog without a license. *State v. Smith*, 140.

The statute relating to licensing is constitutional. *Ibid.*

A vicious dog cannot lawfully be kept at all. *Ibid.*

Complaint for keeping an unlicensed dog held insufficient. *State v. Brown*, 410.

Compensation for damages done by dogs. *Barber v. Dummerston*, 330.

Liability of town under V. S. 4841 not retrospective. *Ibid.*

EJECTMENT.

Justices without jurisdiction in ejectment proper. *Sartwell v. Soules*, 270.

Right of defendant in ejectment to recover for betterments. *Rutland R. Co. v. Chaffee*, 404.

Right as to betterments not affected by constructive notice. *Ibid.*

Application of betterment statute to railroad company's right of way acquired by power of eminent domain. *Ibid.*

Structures on right of way not necessarily nuisances. *Ibid.*

Defendant in ejectment may recover for betterments on right of way of railroad. *Ibid.*

Judgment creditors must in such case resort to equity. *Ibid.*

EMINENT DOMAIN.

Right of, not to be exercised through commissioners under V. S. 3860 and 3864. *Rutland-Canadian R. R. Co. v. C. V. Ry. Co.*, 128.

What would involve the exercise of the power of. *Ibid.*

Property already taken for a public use. *Ibid.*

Authority to take given in general terms. *Ibid.*

When only implied authority to take can arise. *Ibid.*

Implication from necessity. *Ibid.*

Damages to mill-owners from the taking of waters how determined. *In Re Barre Water Co.*, 413.

Estate of railroad company in land taken by power of. *Rutland Railroad Co. v. Chaffee*, 404.

Application of betterment statute in case of improvements on railroad company's right of way taken by power of eminent domain. *Ibid.*

EMPLOYEES.

See BONDS. MASTER AND SERVANT.

EQUITY.

See CHANCERY.

ESTABLISHED.

When a hospital was "established" within the meaning of that word as used in a will. *In Re Susan Pierpoint's Will*, 204.

ESTATES OF DECEASED PERSONS.

Commissioners are without jurisdiction of an equitable claim. *Barton National Bank v. Atkins*, 33.

Enforcement of statutory liability against estate of deceased stockholder. *Ibid.*

Valid assignment by heir of his expectancy. *Fuller v. Parmenter*, 362.

See WILLS.

EVIDENCE.

Relevancy in General.

Proper which meets claim of adverse party. *Hoadley v. International Paper Co.*, 79. *Daggett v. Champlain Manufacturing Co.*, 332.

Similar but unconnected facts inadmissible. *State v. Totten*, 73.

Collateral facts. *Clark v. Smith and Hays*, 138. *Blaisdell and Barron v. Davis*, 295.

Facts inter-dependent for probative effect. *State v. Totten*, 73.

Facts unconnected without proof of like conditions. *Sullivan v. Delaware & Hudson Canal Co.*, 353.

Fictitious defense in a criminal case evidence of guilt. *Ibid.*

Unconnected facts. *State v. Doherty*, 381.

Identification of property feloniously taken. *State v. Fitzgerald*, 142.

Recent possession of stolen property on a trial for the felonious taking of the same. *Ibid.*

Bearing of the manner in which one keeps, uses and exhibits stolen property in his possession. *Ibid.*

Connected facts. *Ibid.*

Evidence conformable to issues. *Sartwell v. Sowles*, 270.

Proof under a plea of *nul tiel* record. *Wood v. Agostines*, 51.

Evidence bearing on the probability of a disputed fact. *Blaisdell and Barron v. Davis*, 295.

Evidence as to the financial worth in his life-time of one deceased. *Ibid.*

Unconnected facts. *Ibid.*

Instructions conveyed through agent when a part of the *res gestae*. *Blair v. Ritchie*, 311.

Agent may testify that he followed instructions of principal. *Ibid.*
Evidence to show malice. *Knapp v. Wing*, 334.
Showing influence of property to alienate affections. *Ibid.*
Dependent or subsidiary evidence. *State v. Smith*, 366.
Facts irrelevant to show alteration of bond. *Hardwick Savings Bank v. Drenan*, 438.

Remoteness of Evidence.

Character as to remoteness determined by other evidence. *Blaisdell and Barron v. Davis*, 295.
Remote fact. *State v. Doherty*, 381.
Ruling as to remoteness not ordinarily revisable. *Ibid.*

Circumstantial Evidence.

In connection with proof of the *corpus delicti* in a criminal case. *State v. Fitzgerald*, 142.
Showing steps preliminary to the consummation of the crime charged. *State v. Smith*, 366.
Solicitation of the bribe by a respondent charged with bribery. *Ibid.*
Negotiations claimed to have culminated in the bribery charged. *Ibid.*
Conduct tending to show guilt. *Ibid.*
Evidence to show preparation for crime. *State v. Doherty*, 381.
Showing premeditation when the crime charged is murder. *Ibid.*
Ascertainment of facts by evidence wholly circumstantial. *Clark v. Employers' Liability Assurance Co.*, 458.

Opinion and Expert Evidence.

Identification more than mere opinion. *State v. Powers*, 168.
Submission of hypothetical question to opposing counsel. *State v. Doherty*, 381.
Lack of opportunity to examine hypothetical question as a ground of objection. *Ibid.*
Range of facts in evidence to which hypothetical question relates affects the weight of the testimony elicited but not its admissibility. *State v. Doherty*, 381.

Prima Facie Evidence, Measure and Burden of Proof.

Prima facie evidence of negligence on the part of a railroad company under V. S. 3926. *Farrington v. Rutland R. R. Co.*, 24.
Burden of proof as to negligence under V. S. 3926. *Ibid.*
Burden of proof as to contributory negligence. *Boyden v. Fitchburg R. R. Co.*, 89.

Town clerk's certificate on deed only *prima facie* evidence of time when it was left for record. *Blair v. Ritchie*, 311.

Measure and burden of proof of insanity in a criminal case: *State v. Doherty*, 381.

Measure and burden of proof in respect to an alibi. *State v. Powers*, 168.

Declarations.

Of a third person to show that he committed the crime with which a respondent is charged, inadmissible. *State v. Totten*, 73.

As characterizing possession. *Ibid.*

Mere recital of past transactions by which possession was acquired. *Ibid.*

Declarations of party who is a witness as evidence in chief and as impeaching evidence. *Herrick v. McCawley*, 240.

Circumstances and conversation giving force and certainty to declarations. *Blaisdell and Barron v. Davis*, 295.

Natural import of declarations made in conversation. *Ibid.*

Declarations of agent when not a part of the *res gestae*. *Hardwick Savings Bank v. Drenan*, 438.

Declaration of agent as to matter to which his employment does not extend. *Ibid.*

Declaration of opinion or information rather than of knowledge. *Ibid.*

Declarations of agent a part of the *res gestae*. *Blair v. Ritchie*, 311.

Admissions and Concessions.

Admission as ground of receiving book. *Blaisdell and Barron v. Davis*, 295.

Scope of admission as to correctness of book. *Ibid.*

Admissions of a party charged with crime. *State v. Smith*, 366.

Silence under accusation express or implied. *Ibid.*

Concessions in lieu of evidence on trial for a misdemeanor. *State v. Waite*, 108.

Effect given to a concession. *Rioux v. Ryegate Brick Co.*, 148.

Character.

Evidence of good character in behalf of one charged with crime. *State v. Totten*, 73.

Period to which evidence of good character relates to be considered. *Ibid.*

Tendency of evidence of good character on the part of one charged with crime. *State v. Fitzgerald*, 142.

Documentary Evidence.

Production of private letters for purposes of public justice. *Barrett v. Fish*, 18.

That the possessor of such letters tending to criminate the writer is a state's attorney is immaterial. *Ibid.*

Endorsement on note, evidence of what. *Palmer v. Lawrence*, 14.

Writings admissible in connection with oral testimony. *State v. Fitzgerald*, 142.

Copies of lost writings found by the court to have been lost. *Ibid.*

Book entries made in the regular course of business. *State v. Powers*, 168.

Entries bearing upon the reliability of the book. *Ibid.*

Impeachment of book by inspection. *Ibid.*

Plan as evidence. *Hyde v. Swanton*, 242.

Judgment in a criminal case as evidence in a civil proceeding. *State v. Adams*, 253.

Book made admissible by admissions. *Blaisdell and Barron v. Davis*, 295.

Inventory as evidence of financial worth in his life-time of one deceased. *Ibid.*

Original books of account as independent evidence. *Post v. Kenerson*, 341.

Mere form not material to admissibility of book. *Ibid.*

Acceptance of drafts shown by book. *Ibid.*

Oral and Extrinsic Evidence.

Of a warranty in connection with receipted statement of account. *Putnam v. McDonald*, 4.

To show that a note purporting to be witnessed was not witnessed when delivered. *Webster v. Smith*, 12.

When rule as to oral evidence to vary a written instrument has no application. *Ibid.*

As to true date of a writ, the date appearing to have been altered. *Sartwell v. Sowles*, 270.

Waiver of the Statute of Frauds, by not objecting to oral evidence. *Ibid.*

When not admissible to show partial failure of consideration of note. *Russell v. Rood*, 238.

Oral evidence to contradict officer's return. *Yatter v. Pitkin*, 255.

Extrinsic fact in connection with school district record. *Blaisdell and Barron v. School District*, 63.

Proof of want of jurisdiction in debt on judgment. *Wood v. Agostines*, 51.

To show when deed was left for record. *Blair v. Ritchie*, 311.

Presumptions.

Presumption that language used is understood according to its plain import. *Clement v. Skinner*, 159.

Presumption of payment from lapse of time. *Fletcher v. Fletcher's Estate*, 268.

Presumption as to attachable property of absent debtor. *Yatter v. Smilie*, 349.

Presumption of correctness of officer's returns. *Yatter v. Pitkin*, 255.

Experiments.

Illustrations and experiments as evidence. *Hardwick Savings Bank v. Drenan*, 438.

Experiments before the jury. *Ibid.*

Experiments by the jury. *Ibid.*

Harmless Evidence.

An instance of. *Court of Insolvency v. Alexander*, 15.

That a fact is conceded renders error in proving it harmless. *Hyde v. Swanton*, 242.

Irrelevant testimony which is not prejudicial. *Ibid.*

Error in reception of evidence cured by verdict. *Ibid.*

Legal Sufficiency and Tendency of Evidence.

Evidence sufficient to support findings of trial court. *Blaisdell and Barron v. School District*, 63.

To be submitted to the jury on a trial for burglary. *State v. Fitzgerald*, 142.

Evidence tending to sustain the declaration. *Clark v. Employers' Liability Assurance Co.*, 458.

Cause of action to be proved as alleged. *Ibid.*

Proof of matter alleged under a restrictive or explanatory *videlicet*. *Ibid.*

Evidence how viewed on a motion for a verdict. *Boyden v. Fitchburg R. R. Co.*, 89.

Legal tendency of evidence for the court. *State v. Smith*, 366.

Evidence of a party viewed as a whole in determining its tendency. *Carter v. C. V. R. R. Co.*, 190.

Inferences from Evidence and its Absence.

Evidence ground for opposing inferences of fact. *Clark v. Employers' Liability Assurance Co.*, 458.

Inferences from non-production of book. *Blaisdell and Barron v. Davis*, 295.

Inferences as to letter not produced. *Ibid.*

Inferences of fact from language of letter as to facts within the writer's knowledge. *Ibid.*

Non-production of incompetent evidence. *Ibid.*

Absence of evidence equally accessible to both parties, prejudicial to neither. *Wood v. Agostines*, 51. *Daggett v. Champlain Manufacturing Co.*, 332.

Weighing Evidence.

Evidence in the light of matters of common knowledge. *Griffith v. N. E. Telephone Co.*, 441.

Cautionary instructions as to evidence. *State v. Powers*, 168.

Introduction of Evidence.

Error in reception cured by charge. *Clement v. Skinner*, 159.

Objection after answer. *State v. Powers*, 168.

Objection too late. *State v. Fitzgerald*, 142.

Question construed in accordance with its substantial import. *State v. Powers*, 168.

Party may contradict or explain the testimony of his own witness. *Hyde v. Swanton*, 242.

Discretion of court as to latitude of re-examination. *Hyde v. Swanton*, 242.

When reception of evidence is not rendered error by ultimate development of immateriality. *Clark v. Employers' Liability Assurance Co.*, 458.

Exclusion of irresponsible hearsay not specifically objected to at the taking of a deposition. *Ibid.*

Admissibility of a party's evidence must be apparent when offered. *Ibid.*

Order of evidence under rulings not excepted to determines what is rebuttal. *Blaisdell and Barron v. Davis*, 295.

Particular question at particular time. *Knapp v. Wing*, 334.

Offer must show relevancy. *State v. Doherty*, 381.

Immaterial evidence not entitled to corroboration. *Ibid.*

Objections and exceptions without discussion. *State v. Doherty*, 381.

Rights of excepting party to be preserved. *Ibid.*

Effect of not objecting for variance. *Clark v. Employers' Liability Assurance Co.*, 458.

Witnesses.

Party as a witness. *Herrick v. McCawley*, 240.

Impeachment by showing inconsistent declarations. *Herrick v. McCawley*, 240.

Qualification of witness to hand-writing. *Blaisdell and Barron v. Davis*, 295.

Cross-Examination.

Questions to test accuracy. *State v. Powers*, 168.

Questions to show the relations of the witness with the party calling him. *Ibid.*

Showing by a witness what his business is. *Ibid.*

Cross-examination to show ill-will. *Hyde v. Swanton*, 242.

Proper cross-examination. *Fletcher v. Fletcher's Estate*, 268.

Unnecessary embodiment of irrelevant and prejudicial matter in a question.

Clark v. Employers' Liability Assurance Co., 458.

Cross-examiner not required to disclose the purpose of an inquiry. *Knapp v. Wing*, 334.

Inquiry to show subject-matter of a correspondence. *Ibid.*

EXCEPTIONS.

Case in which exceptions do not lie. *Littleton Bridge Co. v. Pike*, 7.

Error must affirmatively appear. *Boyden v. Fitchburg R. R. Co.*, 89.

Presumption when record is silent. *Hyde v. Swanton*, 242.

The practice of referring to a transcript of the whole case is objectionable in the extreme. *Blaisdell and Barron v. School District*, 63.

If a transcript of the entire case is referred to for exceptions, any exception relied on should be pointed out. *Ibid.*

Questions not shown to have been made below will not be considered. *Ibid.* *State v. Powers*, 168.

Abandoned and new points. *State v. Schoolcraft*, 223.

Time for filing exceptions. *Mead v. Moretown*, 323.

EXECUTION.

Sale of homestead on, enjoined. *Hyser v. Mansfield*, 71.

Time of return shown by the return itself. *Yatter v. Pitkin*, 255.

Rule as to issuance within a year and a day. *Yatter v. Smilie*, 349.

Time for issuance extended only for sufficient reasons. *Ibid.*

What are not sufficient reasons. *Ibid.*

What is not a waiver in respect to time of issue. *Ibid.*

V. S. 1723 affords no implication of right to execution upon surrender of debtor by bail. *Ibid.*

Alias and pluries executions. *Ibid.*

Execution on judgment for betterments. *Rutland R. R. Co. v. Chaffee*, 404.

Execution cannot be levied on right of way of a railroad company. *Ibid.*

EXEMPTION.

See TAXATION.

EXPECTANCY.

Assignment of, by heir. *Fuller v. Parmenter*, 362.

Notice to ancestor. *Ibid.*

New act after ancestor's death. *Ibid.*

FEES.

- Of justices in criminal cases. *Fay v. Barber*, 55.
- Of justices for complaint and warrant in proceedings against intoxicating liquor. *Ibid.*
- Officers entitled to no fee if liquor is not found. *Ibid.*
(See Acts of 1900, No. 74.)

FELLOW-SERVANT.

See MASTER AND SERVANT, NEGLIGENCE.

FILING.

See DEED.

FINDINGS.

- Distinguished from recitals of evidence. *State v. Johnson*, 118.
- Of referee supported by evidence. *Rioux v. Ryegate Brick Co.*, 148.
- Of master sustained by substantial evidence. *Sheldon v. Clemmons*, 185.
Herrick v. McCawley, 240.
- Of trial court. *Hyde Park Lumber Co. v. Shepardson*, 188.
- Of jury as related to issues formed. *Lamoille County National Bank v. Hunt*.
357.
- Of jury under erroneous instructions not determinative. *Lambert v. Missis-*
quoi Pulp Co., 278.
- Case remanded for further findings by referee. *Conn. General Life Ins Co.*,
v. Chase, 176.
- Finding of jury rendering request to charge immaterial. *Boyden v. Fitch-*
burg R. R. Co., 89.
- Findings of commissioner based on proper evidence unaffected by recep-
tion of improper evidence. *Fuller v. Parmenter*, 362.

FIXTURES.

- What ordinarily removable immaterial when lease is decisive. *Boyd v.*
Douglass, 449.
- Building as a fixture *Ibid.*

FORECLOSURE.

See CHANCERY.

FRAUD.

- On sureties, of obligee in a bond. *Conn. General Life Ins. Co. v. Chase*, 176.
- "Fraud, accident and mistake." *Delaney v. Brown*, 344.
- Fraud by heir upon ancestor. *Fuller v. Parmenter*, 362.

Reinstatement of mortgage for fraud. *Howard v. Clark*, 429.

In the absence of fraud findings supported by evidence are conclusive.

Herrick v. McCawley, 240.

Failure to plead a proper offset not conclusive of fraud and collusion.

Sheldon v. Clemmons, 185.

FRAUDS, STATUTE OF.

A rule of evidence. Waiver by not objecting. *Sartwell v. Sowles*, 270.

GRAND JURY.

Irregularities in grand jury room not reached by demurrer, motion to dismiss or motion in arrest. *State v. Johnson*, 118.

GUARANTY.

A guaranty construed as limited rather than continuing. *Cheshire Beef Co. v. Thrall*, 9.

Construction of guaranties. *Ibid.*

HEIRS AND LEGATEES.

See CHANCERY, ESTATES OF DECEASED PERSONS, WILLS.

HOMESTEAD.

In case of a housekeeper who is an unmarried man without children.

Hyser v. Mansfield, 71.

See CHANCERY.

HOMICIDE.

Premeditation when charge is murder. *State v. Doherty*, 381.

Time for premeditated determination to kill. *Ibid.*

Bearing of fear, fright, nervousness and cowardice. *Ibid.*

When fear, etc. are consistent with murder. *Ibid.*

When fear, etc. render a homicide manslaughter. *Ibid.*

When fear, etc. render a homicide justifiable. *Ibid.*

Killing in mutual combat. *Ibid.*

Change from murderous intent after affray begun. *Ibid.*

Question of superior strength in connection with use of revolver. *Ibid.*

See EVIDENCE, NEW TRIAL.

HUSBAND AND WIFE.

An unmarried man without children may be the head of a family and a housekeeper. *Hyser v. Mansfield*, 71.

Husband's liability for misdemeanor of wife. *State v. Leonard*, 102.

- Agency of wife in sale of liquor. *Ibid.*
Real estate of wife. *Curtis v. Simpson*, 232.
Marital rights of husband in real estate of wife, *Ibid.*
The wife's equity in her real estate. *Ibid.*
Facts equivalent in their effect to an ante-nuptial or to a post-nuptial agreement. *Ibid.*
Non-existence of reasons for marital rights of husband in real estate of wife. *Ibid.*
Cessation of marital rights of husband in real estate of wife. *Ibid.*
Alienation of husband's affections. *Knapp v. Wing*, 334.
Living under a marriage relation forbidden here but contracted in another State. *State v. Richardson*, 49.

INJUNCTION.

See CHANCERY, INTOXICATING LIQUOR.

INSOLVENCY.

- Separate bonds of co-assignees. *Court of Insolvency v. Alexander*, 15.
Effect of discharge in insolvency upon claims for conversion of property. *Paterson v. Smith*, 288.
Effect of discharge upon claim based upon conversion not affected by merger in judgment. *Ibid.*
Joint judgment for conversion. Discharge in insolvency of one judgment debtor. *Ibid.*

See CHANCERY.

INSURANCE.

- Construction of accident insurance contract. "Indirectly" not synonymous with "partly." *Clark v. Employers' Liability Assurance Co.*, 458.
Proof of injury as alleged in an action on an accident insurance policy. *Ibid.*
Insurance agent's bond. *Conn. General Life Ins. Co. v. Chase*, 176.
Construction of accident insurance policy. "Wholly and continuously disabled." *Bylow v. Union Casualty & Surety Co.*, 325.
Accident insurance. Identity of occupation. *Ibid.*
Recovery on an insurance contract under the general counts. *Wertheim v. Fidelity and Casualty Co.*, 326.
Acts of 1896, No. 121, Sec. 1, declaratory. *Ibid.*

INTEREST.

- On reinstated mortgage. *Howard v. Clark*, 429.
On trust voluntarily created. *Ibid.*

INTOXICATING LIQUOR.

Fermented cider included in the category of intoxicating liquors. *State v. Waite*, 108.

Meaning of the word "cider" as used in V. S. 4463 and 4465. *Ibid.*

Allegations and proof when the offense relied on is the illegal sale of fermented cider. *Ibid.*

Concessions of sales in lieu of proof. *Ibid.*

Furnishing of intoxicating liquor by a boarding house keeper to his boarders as a part of their meals. *State v. Lotti*, 115.

Sale of methyl or wood alcohol legal. *Fabor v. Green*, 117.

Scope of the laws against the liquor traffic. *Ibid.*

Application of the doctrine of *res judicata*. *State v. Leonard*, 102. . *State v. Adams*, 253. *Bacon v. Hunt*, 98.

Proceedings for forfeiture of liquors *inter partes* as to claimant. *State v. Adams*, 253.

Mutuality of right between State and claimant. *Ibid.*

Husband's liability for sales by wife. *State v. Leonard*, 102.

Extent of bar of former conviction. *Ibid.*

Rights of person apprehended as owner or keeper. *State v. Jabbour*, 22.

Person arrested as intoxicated may be detained in village lock-up. *State v. Dohney*, 260.

Injunction against liquor nuisance. *State v. Massey*, 210. *State v. Allison*, 222.

Construction of No. 90, Acts of 1898 relating to liquor nuisances. *State v. Massey*, 210.

Discretion of state's attorneys as to joining owners. *Ibid.*

When owner of premises should be joined. *Ibid.*

Allegation of owner's knowledge necessary. *Ibid.*

When owner should be enjoined. *Ibid.*

When owner should not be enjoined. *Ibid.*

Liability of owner for costs when enjoined. *Ibid.*

Landlord's liability for nuisance, same as at common law. *Ibid.*

Scope of injunction against owner. *Ibid.*

Scope of injunction against keeper. *Ibid.*

Mortgagees as parties defendant. *Ibid.*

Allegation of right of possession or control necessary. *Ibid.*

Allegation of maintenance of nuisance not necessary. *Ibid.*

JURISDICTION.

Justice without, when title to land is concerned. *Sartwell v. Sowles*, 270.

Justice without, in ejectment except under V. S. 1560. *Ibid.*

Question of, rendered *res judicata* in an action of *audita querela*. *Ibid.*

Of Probate Court under V. S. 2613. *Mitchell v. Blanchard*, 85.

JURY.

Questions of fact for the jury. *Bacon v. Hunt*, 98.

Limitation on constitutional right to jury trial. *Hurlburt v. Miller's Estate* 110.

Question improperly submitted to the jury. *Rowell v. Estate of Lewis*, 163.

Bound by instructions. *Hyde v. Swanton*, 242.

Jury drawn from part of the array. *Lamoille County National Bank v. Hunt*, 357.

Impanelling the jury. Preliminary examination. *State v. Smith*, 366.

Business relations of juryman with contemplated witness. *Ibid.*

Remote prejudice or bias. *Ibid.*

Irregularities in the grand jury room. *State v. Johnson*, 118.

See EVIDENCE, NEGLIGENCE.

JUSTIFICATION.

None under process void on its face. *Sartwell v. Sowles*, 270.

LANDLORD AND TENANT.

Landlord's liability for nuisance maintained by tenant. *State v. Massey*, 210.

Tenancy at will created by an oral lease. *Sartwell v. Sowles*, 270.

Tenancy at will may ripen into a tenancy from year to year. *Ibid.*

Lease may determine what fixtures are removable. *Boyd v. Douglass*, 449.

Building as a fixture. *Ibid.*

LIMITATIONS.

See STATUTE OF LIMITATIONS.

MASTER AND SERVANT.

Provision by master of safe place in which to work. *Lambert v. Missisquoi Pulp Co.*, 278.

The provision of a staging does not ordinarily pertain to the duty of the master. *Ibid. Garrow v. Miller*, 284.

Master's liability in respect to material furnished for a staging. *Lambert v. Missisquoi Pulp Co.*, 278.

Non-liability of master in respect to construction of staging. *Ibid.*

Relation of master to defective part of staging alone material. *Garrow v. Miller*, 284.

Foreman a fellow-servant in respect to the construction of a staging. *Ibid. Lambert v. Missisquoi Pulp Co.*, 278.

Workman who comes upon a job after the staging is built. *Ibid.*

Duty of after-employed workmen in respect to staging. *Ibid.*

Negligence of an incompetent fellow-servant. *Ibid.*

Case in which the fellow-servant doctrine is held not to be involved. *Hoadley v. International Paper Co.*, 79.

Duty of mining company to employees. *Severance v. N. E. Talc Co.*, 181.

Risks due to master's negligence. *Ibid.*

The fellow-servant doctrine stated. *Garrow v. Miller*, 284.

See AGENCY, NEGLIGENCE.

MANDAMUS.

Cases of. *Fay v. Barber*, 55. *Yatter v. Smilie*, 349. *Fairbanks v. Rockingham*, 419.

MORTGAGE.

Ownership of property not relinquished by taking a mortgage thereon.

Hyde Park Lumber Co. v. Shepardson, 188.

Relation of mortgagee to premises maintained as a nuisance. *State v. Massey*, 210.

See DEED, CHANCERY, PLEDGE.

MURDER.

See HOMICIDE.

NEGLIGENCE.

When the question of negligence is for the court. *Carter v. C. V. R. R. Co.*, 190. *Kilpatrick v. Grand Trunk Ry. Co.*, 263.

Working on Sunday not a proximate cause of an injury received while so working. *Hoadley v. International Paper Co.*, 79.

Imputed negligence. *Boyden v. Fitchburgh R. R. Co.*, 89.

Duty to one in self-incurred danger. *Willey v. Boston & Maine R. R. Co.*, 121.

Plaintiff's negligence remote, defendant's proximate. *Ibid.*

Plaintiff's contributory negligence disclosed by his own case. *Carter v. C. V. R. R. Co.*, 190.

Negligence of traveller at railroad crossing. *Ibid.*

Prudence and vigilance required of traveller at railroad crossing. *Ibid.*

Reciprocal duties of traveller and railroad company. *Ibid.*

Traveller must not neglect duty in reliance upon railroad company's performance of duty. *Ibid.*

Lack of due warning by railroad company bears upon the duty of the traveller. *Boyden v. Fitchburg R. R. Co.*, 89.

Duty of traveller to "look and listen." *Ibid.*

Contributory negligence of plaintiff when defendant's negligence lies in the disregard of a statutory duty. *Kilpatrick v. Grand Trunk Ry. Co.*, 263.

Negligence of plaintiff remote. *Ibid.*

Implied undertaking of telephone company in respect to special knowledge and skill. *Griffith v. N. E. Telephone Co.*, 441.

Duty of telephone company in respect to the use of known and approved devices for safety. *Ibid.*

Duty of railroad company in respect to the use of appliances for safety. *Farrington v. Rutland R. R. Co.*, 24.

No duty based on conjecture. *Ibid.*

Cases in which the question of negligence was for the court. *Carter v. C. V. R. R. Co.*, 190. *Kilpatrick v. Grand Trunk Ry. Co.*, 263.

Cases in which the question of negligence was for the jury. *Farrington v. Rutland R. R. Co.*, 24. *Boyden v. Fitchburg R. R. Co.*, 89. *Willey v. Boston and Maine R. R. Co.*, 120. *Severance v. N. E. Talc Co.*, 181. *Lambert v. Missisquoi Pulp Co.*, 278. *Sullivan v. Delaware and Hudson Canal Co.*, 353. *Griffith v. N. E. Telephone Co.*, 441.

See MASTER AND SERVANT.

NEGOTIABLE INSTRUMENTS.

Negotiability of a school district order. *Blaisdell & Barron v. School District*, 63.

Attachment by trustee process of negotiable paper transferred to a bank without this State. *Hawley v. Hurd*, 122.

Construction of the words, "I will pay this note at any time," endorsed on a note by the maker. *Rowell v. Estate of Lewis*, 163.

Construction of the words, "good at any time," endorsed on a note by the maker. *Ibid.*

Who are original parties to a note. *Russell v. Rood*, 238.

Partial failure of consideration. *Ibid.*

Showing that a note was not witnessed when delivered. *Webster v. Smith*, 12.

An endorsement on a note evidence of what. *Palmer v. Lawrence*, 14.

Sale of merchandise to be applied on a note. *Rowell v. Estate of Lewis*, 163.

Application made by law. *Ibid.*

Signer of note expressly promising as principal cannot defend as surety. *Lamoille County National Bank v. Hunt*, 357.

Waste of collateral securities furnished by maker of note not sued. *Ibid.*

See PLEDGE.

NEW TRIAL.

- Surprise. One party misled by the other. *Webster v. Smith*, 12.
Newly discovered evidence, in part rebutting. *State v. Powers*, 168.
Remittitur on petition for new trial. *Fletcher v. Fletcher's Estate*, 268.
Newly discovered evidence of insanity of respondent. *State v. Doherty*, 381.
Newly discovered evidence of insanity with the other evidence must generate a doubt of guilt. *Ibid.*

NOTICE.

- Notice filed with the general issue. *Blaisdell and Barron v. Davis*, 295.
Notice in the nature of a plea. *Ibid.*
Notice not a specification. *Ibid.*
Notice to ancestor of assignment of expectancy in his estate. *Fuller v. Parmenter*, 362.
Right as to betterments of defendant in ejectment not affected by constructive notice of title. *Rutland R. R. Co. v. Chaffee*, 404.
Deed recorded contrary to instructions not constructive notice. *Blair v. Ritchie*, 311.
Notice of assistance to poor person. *Mount Holly v. Peru*, 68.

NUISANCE.

- Erections on right of way of railroad company not necessarily nuisances. *Rutland R. R. Co. v. Chaffee*, 404.

See INTOXICATING LIQUOR.

PARTIES TO ACTIONS.

- Beneficiary may sue on insurance contract. *Clarke v. Employers' Liability Assurance Co.*, 458.
Liability enforceable in equity by the one to be benefited. *Congregational Society v. Flagg*, 248.

See CHANCERY, INTOXICATING LIQUOR.

PAUPERS.

- When town is liable for the support of a married woman living apart from her husband. *Mount Holly v. Peru*, 68.
Notice of assistance to a married woman living apart from her husband. *Ibid.*
Pauper kept by one town in another is a resident of the supporting town. *Sheldon Poor House Ass'n. v. Sheldon*, 126.
Education of pauper children by the town of their residence. *Ibid.*
Education of pauper children in the public schools of the town in which they are kept. *Ibid.*

PAYMENT.

Application of purchase price of goods sold in payment of an indebtedness.

Rowell v. Estate of Lewis, 163.

Application of a payment made to apply on an indebtedness consisting of several debts. *Ibid.*

Presumption of payment from lapse of time. *Fletcher v. Fletcher's Estate*, 268.

PERJURY.

May be committed on a trial under an insufficient indictment. *State v. Rowell*, 28.

Indictment bad for uncertainty. *Ibid.*

PERSONAL ESTATE.

Right of a father to the services of his daughter is not, within the meaning of V. S. 2446. *Davis v. Carpenter*, 259.

PLEADING.

The general issue in an action of debt on judgment. *Wood v. Agostines*, 51.

Irregularities in the grand jury room not reached by a motion to dismiss, a demurrer, or a motion in arrest. *State v. Johnson*, 118.

Demurrer for insufficient allegation of damages overruled. *Holden v. Rutland R. R. Co.*, 156.

Indictment for perjury held bad for uncertainty. *State v. Rowell*, 28.

Sufficient declaration upon a contract. *Clement v. Skinner*, 159.

True date of writ shown under a motion to dismiss. *Sartwell v. Sowles*, 270.

General issue with notice. *Blaisdell and Barron v. Davis*, 295.

Notice in the nature of a plea. *Ibid.*

Notice not in the nature of a specification. *Ibid.*

Declaration in the general counts on an insurance policy. *Wertheim v. Fidelity and Casualty Co.*, 326.

The general counts must contain a count appropriate to the cause of action. *Ibid.*

Loss of *consortium* the gist of an action for the alienation of the affections of a husband. *Knapp v. Wing*, 334.

Denial of leave to amend discretionary. *Lamoille County National Bank v. Hunt*, 357.

Plea of *res judicata* after suit commenced. *Ibid.*

Complaint for keeping an unlicensed dog held insufficient. *State v. Brown*, 410.

Complaint should state facts constituting the offense charged. *Ibid.*

Grand juror's complaint not amendable in substance in the appellate court.

Ibid.

Office of a videlicet. *Clark v. Employers' Liability Assurance Co.*, 458.

Relevant and consistent allegations under a videlicet traversed by the general issue. *Ibid.*

Unnecessary but relevant allegations. *Ibid.*

See CHANCERY, INTOXICATING LIQUOR.

PLEDGES.

Transaction constituting a pledge, *Samson v. Rouse*, 422.

Possession essential to validity of pledge. *Ibid.*

Delivering back of pledge for special purpose does not interrupt possession of pledge. *Ibid.*

Pledged notes delivered back for collection. *Ibid.*

Agreement for substitution. When pledge fails. *Ibid.*

Agreement for pledge does not constitute a pledge. *Ibid.*

Pledged notes delivered back and mingled with other assets. *Ibid.*

Not practicable to render notes indistinguishable. *Ibid.*

Doctrine as to the commingling of property not applicable to pledged notes delivered back for a special purpose. *Ibid.*

PRACTICE.

Pro forma reversal in Supreme Court with leave to amend. *State v. Austin*, 46.

A concession taken to be based on knowledge of the conceded fact. *Rioux v. Ryegate Brick Co.*, 148.

Case remanded for further findings. *Conn. General Life Ins. Co. v. Chase*, 176.

Abandoned and new points in the Supreme Court. *State v. Schoolcraft*, 223.

Remittitur allowed on hearing petition for new trial. *Fletcher v. Fletcher's Estate*, 268.

Practice in Supreme Court with respect to a discharge in insolvency in proceedings begun after final judgment below. *Paterson v. Smith*, 288.

Case left with the court. *Mead v. Moretown*, 323.

Case standing on report. *Ibid.*

One count good and verdict general. *State v. Smith*, 366.

Election between counts charging the same offense. *Ibid.*

Suggestion of oversight in the Supreme Court. *Town School District v. School District No. 2*, 451.

Motion for re-hearing. *Ibid.*

See ARGUMENT AND REMARKS OF COUNSEL, CHANCERY, CHARGE, CRIMINAL LAW, EXCEPTIONS, EVIDENCE, INTOXICATING LIQUOR, JURY, PLEADING.

PRESUMPTIONS.

See EVIDENCE.

PRINCIPAL AND AGENT.

See AGENCY, MASTER AND SERVANT.

PROBATE COURT.

Jurisdiction of, to appoint a trustee of property, the use of which passes by will. *Mitchell v. Blanchard*, 85.

Jurisdiction of, to compel a discovery in respect to the trusts referred to in V. S. 2613. *Ibid.*

Commissioner appointed by, without jurisdiction of equitable claims. *Barton National Bank v. Atkins*, 33.

PROCESS.

Time of returning precept shown by the return. *Yatter v. Pitkin*, 255.

Return not to be collaterally attacked. *Ibid.*

Return on execution conclusive in action of *scire facias* against bail. *Ibid.*

No justification under process void on its face. *Sartwell v. Sowles*.

Award of certified execution discretionary. *Ibid.*

See CHANCERY, EXECUTION.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

RAILROADS.

Delivery of improper ticket to purchaser and denial of purchaser's right to transportation. *Holden v. Rutland R. R. Co.*, 156.

See EJECTMENT, EMINENT DOMAIN, JURISDICTION, MASTER AND SERVANT, NEGLIGENCE.

RATIFICATION.

Of act of recording deed. *Blair v. Ritchie*, 311.

REAL ESTATE.

Real estate of wife. *Curtis v. Simpson*, 232.

The wife's equity. *Ibid.*

Conveyance by wife of her real estate without joinder of husband. *Ibid.*

Separate character impressed upon real estate by understanding and conduct. *Ibid.*

Cessation of marital rights of a husband in his wife's real estate. *Ibid.*

See CHANCERY, FIXTURES, HOMESTEAD.

RECEIVER.

See ACTIONS, CHANCERY.

RECORD.

Construction of record of school district meeting. *Blaisdell & Barron v. School District*, 63.

Town clerk's certificate of record on deed. *Blair v. Ritchie*, 311.

REFERENCE AND REFEREE.

Discretionary reference under V. S. 1437. *Hurlburt v. Miller's Estate*, 110.

See FINDINGS.

REMITTITUR.

On hearing of petition for new trial. *Fletcher v. Fletcher's Estate*, 268.

REQUESTS.

See CHARGE.

RESIDENCE.

Husband's residence determines that of wife. *Mount Holly v. Peru*, 68.

Contemporaneous intention as affecting residence. *Ibid.*

Residence of pauper supported by one town in another. *Sheldon Poor House Ass'n v. Sheldon*, 126.

Debtor's residence and absence without the State. *Yatter v. Smilie*, 349.

RES JUDICATA.

Place of contract for the purchase of intoxicating liquor. *Bacon v. Hunt*, 98.

Intent with which liquor was kept at the time of a search. *State v. Leonard*, 102.

Intent with which liquor was owned and kept. *State v. Adams*, 253.

Jurisdiction of a justice rendered *res judicata* in an action of *audita querela*. *Sartwell v. Sowles*, 270.

RETURN.

Not to be collaterally attacked. *Yatter v. Pitkin*, 255.

RIGHT OF WAY.

See EJECTMENT.

SALES.

Bill of sale and receipted statement of account distinguished. *Putnam v. McDonald*, 4.

- Mutual promises a consideration for each other. *Patton v. Cardiner Brothers*, 47.
- Passing of title as between parties without delivery. *Ibid.*
- Sale of trust property. Avails of sale stamped with the trust. *Mitchell v. Blanchard*, 85.
- Place of sale of intoxicating liquor. *Bacon v. Hunt*, 98.
- Construction of contract in respect to payment after sale. *Rioux v. Ryegate Brick Co.*, 148.
- Sale of improper railroad ticket. Rights of purchaser. *Holden v. Rutland R. R. Co.*, 156.
- Sale of merchandise to be applied on an indebtedness. *Rowell v. Estate of Lewis*, 163.
- When right to take orders imports no right of sale. *Hyde Park Lumber Co. v. Shepardson*, 188.
- Sale and delivery constituting a conversion. *Ibid.*
- Isolated sale or two not engaging in business. *Parkhurst v. Brock*, 355.

SCHOOLS AND SCHOOL DISTRICTS.

- Liability of school district to creditor unaffected by No. 20, Acts of 1892. *Blaisdell and Barron v. School District*, 63.
- Negotiability of school district order. *Ibid.*
- When Statute of Limitations begins to run on school district order. *Ibid.*
- Construction of record of school district. *Ibid.*
- Education of pauper children. *Sheldon Poor House Ass'n v. Sheldon*, 126.
- School law. No. 130, Acts of 1890, not repealed by No. 5, Acts of 1890. *Town School District v. School District No. 2*, 451.
- Special legislation with regard to the Brattleboro Graded School District. *Ibid.*
- Share of Brattleboro Graded School District in the public money determined by the general law at the time of the division. *Ibid.*
- V. S. 848 provides the only method of division of public money known to the present law. *Ibid.*

SCIENTER.

- Duty to know as the equivalent of knowledge. *Hyde v. Swanton*, 242.

See INTOXICATING LIQUOR.

SCIRE FACIAS.

- Return of officer conclusive as to time of return in *scire facias* against bail. *Yatter v. Pitkin*, 255.

SEARCH AND SEIZURE.

What does not constitute. *Barrett v. Fish*, 18.

See INTOXICATING LIQUOR, FEES.

SEDUCTION.

An action by a father for the seduction of his minor daughter does not survive. *Davis v. Carpenter*, 259.

STATUTE OF FRAUDS.

SEE FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

Does not begin to run on school order until demand of payment. *Blaisdell and Barron v. School District*, 63.

Writing constituting a new promise. *Rowell v. Estate of Lewis*, 163.

Writing constituting an acknowledgment of a debt. *Ibid.*

Effect of acknowledgment or new promise. *Ibid.*

Time of payment, not time of endorsement, material. *Ibid.*

Limitation as to time of issuance of execution not analogous to the Statute of Limitations. *Yatter v. Smilie*, 349.

STATUTES CONSTRUED.

Acts of 1886, No. 79, *Barton National Bank v. Atkins*, 33.

Acts of 1890, No. 5, *School Dist. v. School District No. 2*, 451.

Acts of 1890, No. 130, *Ibid*, 451.

Acts of 1892, No. 20, *Blaisdell & Barron v. School District*, 63.

Acts of 1894, No. 133, *Boyden, Admr. v. Fitch. R. Co.*, 89.

Acts of 1896, No. 86, *Fay v. Barber*, 55.

Acts of 1896, No. 121, Sec. 1, *Wertheim v. F. & C. Co.*, 326.

Acts of 1896, No. 265, *Littleton Bridge Co. v. Pike*, 7.

Acts of 1898, No. 90, *State v. Massey*, 210.

Acts 1898, No. 95, Sec. 6, *Greene v. McDonald*, 258.

Acts of 1898, No. 184, *Montpelier v. Senter*, 112.

V. S. Chap. 187, *Fabor v. Green*, 117.

V. S. 411, *Richardson v. St. Albans*, 1.

V. S. 688, 689, *Sheldon P. House Ass'n v. Sheldon*, 26.

V. S. 848, *School Dist. v. School Dist. No. 2*, 451.

V. S. 901, *Fairbanks v. Rockingham*, 419.

V. S. 981, *Davis v. Carpenter*, 258.

V. S. 981, *Martin v. Palmet*, 409.

- V. S. 1149, 1150, *Blaisdell and Barron v. Davis*, 295.
V. S. 1152, *Russell v. Rood*, 238.
V. S. 1306, *Hawley v. Hurd*, 122.
V. S. 1437, *Hurlburt v. Miller's Est.* 110.
V. S. 1500, *Rut. R. R. Co. v. Chaffee*, 404.
V. S. 1560, *Sartwell v. Sowles*, 270.
V. S. 1626, *Mead v. Moretown*, 323.
V. S. 1667, *Delaney v. Brown and Howes* 344.
V. S. 1723, *Yatter v. Smilie*, 349.
V. S. 2019, *Fay v. Barber*, 55.
V. S. 2071, *Paterson v. Smith*, 288.
V. S. 2074, *Ibid*, 288.
V. S. 2138, *Ibid*, 288.
V. S. 2446, *Davis v. Carpenter*, 259.
V. S. 2595, *Hurlburt v. Miller's Est.*, 110.
V. S. 2613, *Mitchell v. Blanchard*, 85.
V. S. 2703, 2704, *State v. Richardson*, 49.
V. S. 3172, *Mount Holly v. Peru*, 68.
V. S. 3360, 3361, *Fairbanks v. Rockingham*, 419.
V. S. 3821, *Littleton Bridge Co. v. Pike*, 7.
V. S. 3860, *Rut. Can. R. R. v. C. V. Ry. Co.*, 128.
V. S. 3864, *Ibid*, 128.
V. S. 3886, 3887, *Kilpatrick v. G. T. Ry. Co.*, 263.
V. S. 3926, *Farrington v. Rut. R. R.*, 24.
V. S. 4460, *State v. Waite*, 108.
V. S. 4463, *Ibid*, 108.
V. S. 4465, *Ibid*, 108.
V. S. 4471, *State v. Leonard*, 102.
V. S. 4481, *State v. Dohney*, 260.
V. S. 4547, *Fay v. Barber*, 55.
V. S. 4821, *State v. Brown*, 410.
V. S. 4841, *Barber v. Dummerston*, 330.
V. S. 5086, *State v. Smith*, 366.
V. S. 5094, *State v. Dohney*, 260.
V. S. 5366, *Fay v. Barber*, 55.
V. S. 5387, *Ibid*, 55.

See CONSTRUCTION OF STATUTES.

STOCKS AND STOCKHOLDERS.

See CORPORATIONS, CHANCERY, TAXATION.

SUNDAY LAW.

Sunday travel lawful. *Boyden v. Fitchburgh R. R. Co.*, 89.

See NEGLIGENCE.

SURVIVAL OF ACTIONS.

See SEDUCTION.

TAXATION.

Exemption of capital of corporation exempts shares of stock. *Richardson v. St. Albans*, 1.

Shares of stock exempt from taxation by an authorized municipal vote must be deducted from taxpayer's offset. *Ibid.*

TELEPHONE COMPANIES.

Special knowledge and skill required. *Griffith v. N. E. Telephone Co.*, 441.

Implied undertaking in respect to special knowledge and skill. *Ibid.*

Care required of company. *Ibid.*

Duty in respect to the use of known and approved devices. *Ibid.*

Common knowledge of the manner and places of their use. *Ibid.*

TITLE.

Title to material attaches to manufactured product. *Hyde Park Lumber Co. v. Shepardson*, 188.

Title to property not relinquished by taking mortgage upon the same. *Ibid.*

Passing of title as between parties without delivery. *Patton v. Cardiner Brothers*, 47.

TOWNS.

Liability of town for damages done by dogs. *Barber v. Dummerston*, 330.

Liability imposed by V. S. 4841 not retrospective. *Ibid.*

Suit against town for accident from alleged insufficiency of culvert. *Hyde v. Swanton*, 242.

Liability of town for support of pauper kept in another town. *Sheldon Poor House Ass'n v. Sheldon*, 126.

Education of pauper children by the town of their residence. *Ibid.*

Instruction of pauper children in the school of the town in which they are kept. *Ibid.*

What town chargeable with the support of a pauper. *Mount Holly v. Peru*, 68.

Pauper a married woman living apart from her husband in another town. *Ibid.*

TROVER AND CONVERSION.

Sale and delivery constituting trover. *Hyde Park Lumber Co. v. Shepardson*, 188.

Joint judgment for conversion and discharge in insolvency of one debtor against whose estate the judgment is proved. *Paterson v. Smith*, 288.

Nature of claim based on conversion not affected by a judgment so far as insolvency proceedings are concerned. *Ibid.*

TRUSTEE PROCESS.

A trustee can defend on the ground of rights acquired by an assignee who is not a claimant. *Hawley v. Hurd*, 122.

A resident trustee is chargeable upon a debt payable to a non-resident in the state of his domicile. *Ibid.*

Negotiable paper transferred to a bank without this State may be attached by trustee process before notice of transfer. *Ibid.*

Trustee deprived of his day in court by accident. Reliance upon agreement to treat judgment as void. Equitable relief. *Delaney v. Brown*, 344.

See CONSTITUTIONAL LAW.

TRUSTS.

Avails of sales of trust property stamped with the trust imposed upon the property itself. *Mitchell v. Blanchard*, 85.

Jurisdiction of the probate court to appoint a trustee under V. S. 2613. *Ibid.*

Jurisdiction of probate court to compel discovery as to the trusts mentioned in V. S. 2613. *Ibid.*

Simple or dry trust. *Wade v. Button*, 136.

Creation of a valid voluntary trust. *Ibid.*

A valid voluntary trust not defeated by a will subsequently made by the donor. *Ibid.*

Personal liability of trustees. *McIntyre and Wardwell v. Williamson*, 183.

Transactions within scope of trusteeship. *Ibid.*

Trustee how relieved from personal liability. *Ibid.*

Rule as to liability of agents not applicable to trustees. *Ibid.*

VERDICT.

Error in reception of evidence cured by verdict. *Hyde v. Swanton*, 242.

WATERS.

See EMINENT DOMAIN.

WILLS.

Effect given to the probable intention of a testatrix as gathered from the language of her will. *In Re Susan Pierpoint's Will*, 204.

Meaning given to the word "established" as used in a will, with reference to a hospital. *Ibid.*

Provision for investment merely of fund bequeathed. *Congregational Society v. Flagg*, 248.

Provision giving legatee a contingent right to the possession of a fund bequeathed. *Ibid.*

Revival of will upon destruction of revoking will. *In Re Gould's Will*, 316.

Republication not necessary to revival. *Ibid.*

Revival depends upon intention accompanying destruction of revoking will. *Ibid.*

No presumption from mere destruction of revoking will. *Ibid.*

Intention of testator as to revival of former will. Recognition of its existence. Solicitude for its preservation. Satisfaction with its provision. Purpose to die testate. *Ibid.*

Proof of testamentary capacity on probate of revived will. *Ibid.*

Property devised in trust. *Mitchell v. Blanchard*, 85.

Property which passes by will "descends" within the meaning of that word as used in V. S. 2613. *Ibid.*

A will cannot defeat a valid voluntary trust created by the testator in his life-time. *Wade v. Button*, 136.

WITNESSES.

See EVIDENCE.

HARVARD LA